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SUPREME COURT OF THE UNITED STATES.

October Term, 1907.

No. 474.

THOMAS F. HUNTER, Sheriff of Buncombe County, North Carolina, Appellant,

v.

JAMES H. WOOD, Appellee.

BRIEF FOR APPELLEE.

Walker D. Hines,
Alex. P. Humphrey,
Alfred P. Thom,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

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THOMAS F. HUNTER, SHERIFF OF BUNCOMBE COUNTY, NORTH CAROLINA, APPELLANT,

v.

JAMES H. WOOD, APPELLEE.

BRIEF FOR APPELLEE.

Statement of the Case.

At the time of the convening of the Legislature of the State of North Carolina in the year 1907 the Corporation Commission of that State had power to fix rates, conferred by section 1099 of the acts of the General Assembly of North Carolina in respect to the Corporation Commission, which will be found in chapter 20 of the Revisal of 1905 and in the amendments adopted by the Legislature of 1905. That act, so far as important in this connection, is as follows:

> "The Commission shall make reasonable and just rates—
>
> "1. Of freight, passenger and express tariffs for railroads, street railways, steamboats, canal and express companies or corporations, and all other trans-

portation companies or corporations engaged in the carriage of freight, express or passengers.

"2. For the through transportation of freight, express or passengers."

The only limitation upon the power of the Commission in respect to the maximum of passenger rates is found in subsection 9 of section 2567 of the Revisal of North Carolina of 1905, which is as follows:

"Every railroad corporation shall have power:

* * * * * * *

"9. To regulate the time and manner in which passengers and property shall be transported and the compensation to be paid therefor; and such compensation for any passenger and his ordinary baggage *shall not exceed five cents per mile.*"

By section 2618 of the Revisal of 1905 it was provided:

"All railroad companies shall furnish first and second class passenger accommodations."

The Corporation Commission, pursuant to the authority of section 1099, *supra*, fixed the standard passenger tariff as follows:

	First class.	Second class.
Twelve years and over.....	3¼¢	2¾¢
Over five and under twelve years of age	One half first-class fare.	

The above-mentioned rates were in force when the General Assembly of North Carolina convened in January, 1907.

By an act ratified on the second day of March, 1907, the following was placed upon the statute books of North Carolina:

"An act prescribing the maximum charges railroad companies may make for transporting passengers in North Carolina.

"The General Assembly of North Carolina do enact:

"SECTION 1. That no railroad company doing business as a common carrier of passengers in the State of North Carolina, except as hereafter provided, shall charge, demand or receive for transporting any passenger, and his or her baggage not exceeding in weight two hundred pounds, from any station on its railroad in North Carolina to any other station on its said road in North Carolina, a rate in excess of two and one-quarter cents per mile, and for transporting children twelve years of age or under, one-half of the rate above described: Provided that the Corporation Commission of North Carolina is hereby authorized and empowered to permit all independently owned and operated railroad companies in North Carolina, whose mileage of road in said State is sixty miles or under, to charge a rate for transporting passengers not in excess of the present rate fixed and prescribed for said road; and also to permit all railroads constructed within the twelve months preceding the first day of January, nineteen hundred and seven, or at that time in course of construction, for a term of two years from and after July 1st, 1907, and also such railroads as may be constructed within two years from January 1, 1907, to charge such rate in excess of the rate above prescribed as the said Commission may determine to be reasonable. A charge of ten cents may be added to the fare of any passenger when the same is paid upon the cars, if a ticket might have been procured within a reasonable time before the departure of the train; and no railroad company shall be required to accept a single fare for less than five cents.

"SECTION 2. In the case that any railroad company operating as a common carrier of passengers in the State of North Carolina is owned, controlled or operated by lease or other agreement by any other railroad company doing business in this State, the rate for carrying passengers thereon as prescribed in

this act shall be determined for said railroad by the rate prescribed by this act for the railroad company which owns, controls or operates the same; and the North Carolina Corporation Commission shall publish the rates fixed by this act for the several railroad companies operating in this State, on or before the first day of June, 1907.

"SECTION 3. That mileage books of one thousand miles in each book shall be kept on sale at such railroad ticket offices in North Carolina as shall be named and designated by the Corporation Commission of North Carolina, and when such mileage book is purchased it shall be good in the hands of any person or persons named therein on all railroads on which the fare is the same as or less than the fare on the road of the company selling such mileage book; and when the mileage is detached from said book by any other railroad company than the one which sold it, the said mileage shall be redeemable on demand by the railroad company which sold it.

"SECTION 4. That any railroad company violating any provision of this act shall be liable to a penalty of five hundred dollars for each violation, payable to the person aggrieved by such violation, and recoverable in an action to be instituted in the name of said person in any court of this State having competent jurisdistion thereof. And any agent, servant, or employé of any railroad company violating this act shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court.

"SECTION 5. That any person or persons, except those permitted by law, who accept free transportation shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court.

"SECTION 6. That section 2618 of the Revisal of 1905 is hereby repealed, and all laws and clauses of laws in conflict with this act are hereby repealed.

"SECTION 7. That this act shall be in force from and after July 1st, 1907."

By an act ratified on the ninth day of March, 1907, the following was placed upon the statute books of that State:

"An act to prevent unjust discrimination in freight rates and to fix the maximum charges therefor.

"*The General Assembly of North Carolina do enact:*

"SECTION 1. That the Corporation Commission, created by the laws of North Carolina, shall not, in fixing the maximum rates and charges, or tariff of rates or charges for any common carrier transporting freight in North Carolina, permit or allow any such common carrier to charge, collect or receive a greater toll, charge or rate for the transportation of any article of freight or commodity embraced in the present classification fixed and prescribed, or approved by said Corporation Commission where the initial point of shipment is on the road or line of one common carrier in this State and the terminal point of said shipment is on the line or road of another common carrier in this State, than is the sum of the present local rates now established, prescribed or approved by said Corporation Commission, less a reduction of twenty-five per centum of the said local rates on all railroads for which there is now made or prescribed a reduction for a joint haul; and on those railroads for which there is not now prescribed a reduction on joint hauls a reduction of fifteen per centum of the local rates now established, prescribed or approved by said Corporation Commission for said railroads; *Provided,* That those railroads of this class whose rates are lower than the Corporation Commission's standard of freight rates may be permitted by said commission to adopt the standard rates prescribed by said commission; *Provided,* That the Corporation Commission is hereby empowered to reduce the said local rates whenever in its opinion and after investigation by it it shall determine that a lower rate is reasonable: *Provided, further,* That present local rates now established, prescribed or approved by said Corporation Commission shall not be increased by classification or otherwise.

"SECTION 2. That any railroad company doing business in the State of North Carolina, or officer or agent thereof, who shall give to any person or shipper any advantage over another person or shipper under like circumstances by way of any rebate or reduced rate not authorized by law, or by the North Carolina Corporation Commission, or which shall make charges for shipments of freight in violation of the provisions of this act, or shall wilfully discriminate in the matter of service in favor of one person or corporation against another under like circumstances, shall be guilty of a misdemeanor, and such corporation shall, upon conviction, be fined not less than one hundred dollars, and such officer or agent shall be fined or imprisoned or both, in the discretion of the court; and any shipper or consignee of any freight in the State of North Carolina who shall knowingly accept any rebate or other consideration or service from any railroad company which is not allowed or given other shippers or consignees under like or similar circumstances, and which is not allowed by law, shall be guilty of a misdemeanor and fined or imprisoned in the discretion of the court.

"SECTION 3. That whenever any person, firm or corporation intending to ship freight makes a written application to any railroad company for a car or cars to be loaded in carload lots with any kind of freight embraced in the tariffs of said company, stating in said application the character of the freight, the number of cars wanted, the station, depot siding, wharf or boat landing on the road or line of said railroad company whence the shipment is to be moved, and its final destination, the railroad company shall furnish the said car or cars within four days from seven o'clock a. m. the day following such application, which said application shall be delivered to the agent of the railroad company at the station at or nearest the point of shipment. Any railroad company failing to furnish the car or cars named in said written application shall be subject to a penalty of five dollars per car per day for each car not furnished, to be recovered by the person, firm or corporation making said application: *Provided*, That

the said railroad company before furnishing the car or cars upon said application of the shipper may require the person, firm or corporation applying for the same to deposit five dollars for each car so demanded at the time the application is made, which said deposit of five dollars for each car may be retained by the said railroad company as a forfeit for trackage, in case the car or cars are not loaded within forty-eight hours after notice of the placing of said car or cars in accordance with said demand: *Provided* That the Corporation Commission may excuse from the penalties imposed by this section independent lines not owned, operated or controlled by any other line or system when trackage is less than one hundred miles.

"SECTION 4. That section two thousand six hundred and thirty-two of the Revisal of one thousand nine hundred and five of North Carolina be, and the same is hereby amended as follows: By striking out the words 'twenty-five' in line eleven of said act and inserting in lieu thereof the word 'fifteen,' and by striking out the word 'five,' the last word in said line, and inserting in lieu thereof the word 'two,' and by further striking out the words 'twelve and fifty one-hundredth' in lines fourteen and fifteen thereof and inserting in lieu thereof the word 'ten,' and by further striking out the words 'two and fifty one-hundredths' in line fifteen and inserting in lieu thereof the word 'one.'

"That this section four shall not apply to existing causes of action.

"SECTION 5. The Corporation Commission is hereby directed to prepare and publish the tariff of rates, charges and tolls to be charged and collected by railroad companies in this State, as authorized by this act, on or before July the first, one thousand nine hundred and seven.

"SECTION 6. This act shall be in force from and after July the first, one thousand nine hundred and seven.

"In the General Assembly read three times and ratified this the 9th day of March, 1907."

From these two acts, and especially from the act in respect to passenger rates, it will be seen that the rates already fixed by the authority of the State were very materially reduced by the action of the Legislature, and that the authority of the Commission to fix passenger rates was so far qualified that the two classes of fare were abolished, and that the rates fixed by them should not exceed a maximum of two and one-quarter cents per mile.

Regarding these legislative acts as confiscatory, on May 8, 1907, the Southern Railway Company, a corporation of the State of Virginia, filed its bill of complaint in the Circuit Court of the United States for the Eastern District of North Carolina. The parties defendant were Franklin McNeill, Samuel L. Rogers, Eugene C. Beddingfield, Robert D. Gilmer, and Hayden Clement, all of whom were citizens of the State of North Carolina.

The bill of complaint, after alleging the diverse citizenship of the parties and the incorporation of the plaintiff, alleged that the complainant owned and operated 6,989.12 miles of railroad in the States of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Tennessee, Kentucky, Indiana, and Illinois, of which 1,456.72 miles were in North Carolina.

The fourth paragraph of the bill is as follows:

> "4. That the complainant is, and continuously since its organization aforesaid has been, engaged in doing an intrastate business as a common carrier of freight and passengers in the State of North Carolina, and in addition is, and continuously since its said organization has been, engaged in doing, as a common carrier of freight and passengers, a large interstate business in said State of North Carolina, and in and between said State and the other States aforesaid, and other States of the United States, and in and between other States and Territories of the United States, and also is, and since its said organization has been, engaged in said State and the other States aforesaid in foreign commerce."

The next paragraph set out *in hæc verba* the two acts fixing passenger and freight rates, given above.

The sixth and seventh paragraphs of the bill are as follows:

> "6. At its session held in the year 1899 the General Assembly of North Carolina passed an act entitled 'An act to establish the North Carolina Corporation Commission.' Said act has been since amended and as amended provides for the election of three commissioners who shall be known as the North Carolina Corporation Commission, and that each of said commissioners shall take an oath to support the constitution and laws of the State of North Carolina and to well and faithfully execute the duties of his office as a member of the North Carolina Corporation Commission. Said act, as so amended, further provides that said commissioners shall have such general control and supervision of all railroad companies or corporations engaged in the carrying of freight or passengers necessary to carry into effect the provisions of said act and shall have full power to obtain the information necessary for carrying into effect, and otherwise enforcing, the provisions of said act. Said act, as so amended, further provides that if any railroad doing business in the State of North Carolina, or if any such company organized under the laws of any other State and doing business in the State of North Carolina shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, such railroad or company shall be deemed guilty of extortion and upon conviction thereof shall be fined not less than five hundred dollars nor more than five thousand dollars. Said act, as so amended, further provides that any railroad or corporation which violates any of the provisions of said act, or refuses to conform to, or obey, any rule, order or regulation of said commission shall, in addition to the other penalties prescribed in said act, forfeit and pay the sum of five hundred dollars for each offense, to be recovered in

an action to be instituted in the Superior Court of Wake County in the name of the State of North Carolina on the relation of the North Carolina Corporation Commission, and that each day such company, or corporation, continues to violate any provision of said act or continues to refuse to obey or perform any rule, order or regulation prescribed by said North Carolina Corporation Commission shall be a separate offense. Said act, as so amended, further provides that said Corporation Commission whenever in its judgment any corporation has violated or neglected in any respect to comply with the provisions of any law of the State, shall give notice thereof in writing to such corporations, and, if the violation or neglect is continued after such notice, shall forthwith present the facts to the Attorney General who shall take such proceedings thereon as he may deem expedient. By the laws of North Carolina the Assistant Attorney General is invested with the same powers, and is required to perform the same duties, as the Attorney General, among them being the powers and duties just mentioned as appertaining to the Attorney General.

"7. That the above-mentioned defendants, Franklin McNeill, Samuel L. Rogers and Eugene C. Beddingfield, constitute the Corporation Commission of the State of North Carolina, the said Franklin McNeill being chairman, and the said Samuel L. Rogers and Eugene C. Bedingfield being associate members, thereof, and that the defendant Robert D. Gilmer is the Attorney General of the State of North Carolina and the defendant Hayden Clement is the Assistant Attorney General of said State; and all of said defendants have their offices in the city of Raleigh in the State of North Carolina, and the defendants Franklin McNeill, Eugene C. Beddingfield and Robert D. Gilmer are inhabitants of, and reside in, the Eastern District of North Carolina."

The bill then alleged that the existing rates and charges in use on complainant's line were no more than just and reasonable; that taking the ad valorem assessment upon the

property of the complainant in North Carolina as fixed by the authorities of that State and assigning to intrastate traffic the ratio of such value that the gross intrastate traffic revenue in North Carolina bore to the total gross traffic revenue in the State of North Carolina would result in showing that the value of complainant's property used in North Carolina for intrastate purposes, on the basis of the North Carolina assessment for purposes of taxation, was $7,213,222.74; that, applying the rates as fixed by these acts to the business for the year ending June 30, 1906, there would have resulted to the complainant a return of only thirty-nine one-hundredths (39/100) of one per cent. on the said tax value before allowing anything for payment of interest on bonds or dividends on stock. The bill alleged that these figures and their net result were fairly representative of past and future conditions, except that the operating expenses of the plaintiff had, since June 30, 1906, increased relatively far more than its gross revenue, and therefore the net result would in future be even more unfavorable and yield a still smaller return to the complainant than as shown for the year ending June 30, 1906.

The bill showed that the Corporation Commission of North Carolina, in pursuance of its authority to make reasonable and just rates of freight and passenger charges, had, prior to the passage of the 2¼-cent passenger rate act, fixed passenger rates in North Carolina at 3¼ cents per mile for first-class and 2¾ cents per mile for second-class; that since these rates were fixed the cost of performing the service by the complainant had largely increased, and in consequence thereof these rates should, in order to be now just and reasonable, be increased instead of decreased.

The complainant alleged that the result of these acts was to deprive it of its property without due process of law, and to deny to it the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States.

The bill further alleged that by the "Act in Respect to Freight Rates" it was provided that any railroad company doing business in the State of North Carolina, or officer or agent thereof, who shall make charges for shipments of freight in violation of the provisions of the act shall be deemed guilty of a misdemeanor, and such corporation shall, upon conviction, be fined not less than one hundred dollars, and such officer or agent shall be fined or imprisoned, or both, in the discretion of the court; and that by the "Act in Respect to Passenger Rates" it was provided that any railroad company violating any provision of the act shall be liable to a penalty of five hundred dollars for each violation, payable to the person aggrieved by such violation, and recoverable in an action to be instituted in the name of said person in any court of North Carolina having competent jurisdiction thereof, and any agent, servant, or employee of any railroad company violating said act shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court; and that the complainant was advised that the effect of said acts is, in addition to the punishment of the officer, agent, servant, or employee for a misdemeanor, to impose upon the complainant for each shipment of freight at a greater rate than is allowed by the act in respect thereto a fine of one hundred dollars, and for each sale of a passenger ticket at a rate greater than is allowed by the act in respect to passengers a fine of five hundred dollars; and that an effort was thus made to prevent by these enormous penalties, which are in their nature confiscatory of the complainant's property, any inquiry into the validity of these particular statutes, and to so burden any challenge thereof in the courts that the complainant and the others affected thereby must necessarily submit rather than take the chances of the penalties imposed, and that the complainant was advised that the effect of these penalties and of the legislation which imposed them was, because no other person or business in North Carolina

is subjected to such penalties under similar circumstances, to deprive the complainant of the equal protection of the laws, and, moreover, was a denial to the complainant of due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, whose protection the complainant claimed.

It was further shown in said bill that the Corporation Commission of North Carolina was required by the "Act in Respect to Freight Rates" to prepare and publish, before the same should go into effect, the tariff of rates, charges, and tolls to be charged and collected by railroad companies in the State of North Carolina, as authorized by that act; and that by the "Act in Respect to Passenger Rates" the Commission was required, before the time the rates were directed to go into effect, to classify the roads in respect to their charges, and to publish the passenger rates fixed by the last-mentioned act; and it was further alleged that the Corporation Commission of North Carolina was further required by the laws of that State, if the complainant, in the opinion of such Commission, violated the "Act in Respect to Freight Rates," or the "Act in Respect to Passenger Rates," and should charge a rate in excess of the amount permitted by such acts respectively, to give notice in writing to the complainant of such violation, and, if such charge in excess of the rates fixed by said acts was continued after such notice, the Commission was required to present the facts forthwith to the Attorney General, and the Attorney General and the said Assistant Attorney General were required to take such proceedings thereon as they might deem expedient; and the complainant alleged that, unless prevented by the injunction of the court, the said Franklin McNeill, Samuel L. Rogers, and Eugene C. Beddingfield, constituting the Corporation Commission of the State of North Carolina, would, for the purpose of putting the same into effect, make up and publish said tariff of freight charges as provided by the "Act in Respect to Freight Rates," and would undertake to classify the complainant and the

other carriers of North Carolina in accordance with, and would publish the passenger rates prescribed by, the "Act in Respect to Passenger Rates," and would, in case the complainant should exercise its constitutional right to make charges in excess of the rates fixed by the two acts respectively, proceed against the complainant for a violation thereof, and Robert D. Gilmer, Attorney General, and Hayden Clement, Assistant Attorney General, would in such case proceed to impose the penalties prescribed by the two acts on this complainant therefor.

The act of Assembly of North Carolina to which special reference is made in this last-mentioned allegation is section 1113 of the acts relating to the Commission, which is as follows:

> "The Commission, whenever in its judgment any corporation has violated *any* law, shall give notice thereof in writing to such corporation, and if the violation or neglect is continued after such notice, shall forthwith present the facts to the Attorney General, who shall take such proceedings thereon as he may deem expedient."
>
> Acts 1899, ch. 64, section 8.

Other acts of North Carolina in force at the time the bill was filed, and now in force, in respect to the relations of the Corporation Commission to this matter are as follows:

> "The Corporation Commission shall have such general control and supervision of all railroad, street railway, steamboat, canal, express and sleeping car companies or corporations, and of all other companies or corporations engaged in the carrying of freight or passengers, and of all telegraph and telephone companies, of all public and private banks, and all loan and trust companies or corporations, and of all building and loan associations or companies necessary to carry into effect the provisions of this chapter and the laws regulating such companies."
>
> Revisal of 1905, section 1066.

"It shall be the duty of the Attorney General,

"1. To defend all actions in the Supreme Court in which the State shall be interested, or is a party; and also when requested by the Governor or either branch of the General Assembly to appear for the State in any other court or tribunal in any cause or matter, civil or criminal, in which the State may be a party or interested.

"2. At the request of the * * * Corporation commissioners * * * he shall prosecute and defend all suits relating to matters connected with their departments."

* * * * * * *

Revisal of 1905, section 5380.

The complainant prayed for a temporary restraining order and an interlocutory and a final injunction.

Upon presentation of the bill to the Honorable J. C. Pritchard, of the United States Circuit Court, on May 8, 1907, a restraining order was issued and the motion for an interlocutory injunction set down for hearing Wednesday, June 26, 1907. On the day so fixed the parties complainant and defendant appeared. The bill of complaint and the answer were treated as affidavits, and other affidavits were filed by the complainant. The court granted an interlocutory injunction. This order provided that until the further order of the court the defendants, McNeill, Rogers, and Beddingfield, constituting the Corporation Commission of North Carolina, and each of them, individually and jointly, as constituting the Corporation Commission of North Carolina, and each and all of their successors in office, and their and each of their agents and employees, be, and they were thereby, enjoined and restrained from preparing or publishing the tariff of rates, charges, or tolls mentioned in the freight rate act, or from publishing the rates fixed by the passenger rate act; and, further, that until the further order of the court the above-named defendants and each and all of their successors in office, and their and each of their attorneys and employees, and the defendants, Robert D. Gil-

mer, Attorney General, and Hayden Clement, Assistant Attorney General, their and each of their successors in office, and their and each of their attorneys, agents, and employees, are and each of them is "hereby restrained and enjoined from taking any step or steps in pursuance of said act in respect to freight rates or of said act in respect to passenger rates, or of any laws of the State of North Carolina, either directly or through any other attorney, agent or employee or otherwise, or by any suit, prosecution or proceeding, civil or criminal, or in any other manner, for the purpose of enforcing or endeavoring to put into effect, as against the complainant or any of its officers, agents or employees, or to force the complainant or any of its officers, agents or employees to put into effect said act in respect to freight rates or said act in respect to passenger rates, or any part of either of said acts, or the penalties prescribed or provided for in either of said acts, or any other penalties or punishments against the complainant, Southern Railway Company, or against any of its officers, agents or employees, for failure to put into effect or to observe on any of the lines of the said complainant in North Carolina, the freight rates or the passenger rates prescribed or provided for in said acts or either of them, or for failure to comply with either of said acts or with any provision of either of them."

The other clauses of said injunction, from 3 to 12, inclusive, are as follows:

> "3. That, until the further order of the court herein, all other individuals and corporations are and each of them is, hereby restrained and enjoined from instituting, or prosecuting, any suit or prosecution or other proceeding, either civil or criminal, against said complainant, or against any officer, agent or employee of said complainant, for the recovery or imposition of any penalty or punishment, under or by virtue of said act in respect to passenger rates, or the said act in respect to freight rates, or under or by virtue of any law of North Carolina, because of, or growing out of, the failure of the said complain-

ant, or any of its officers, agents or employees, to put into effect, or to observe, on any of the lines of the complainant in North Carolina the freight rates or the passenger rates prescribed in said acts, or in either of them, or to comply with any of the provisions of either of said acts, or for the recovery of any damages or overcharges, because of, or growing out of, any such failure, or for the enforcement of any claim, alleged right or cause of action, growing out of, or connected with, any such failure.

"4. That said complainant, or some one for it, shall, before a judge of this court, or the clerk thereof, execute a bond in the penalty of three hundred and twenty-five thousand dollars, with surety, to be approved by such judge, or by such clerk, conditioned to pay into the registry of this court, from time to time, when and as the court may so order, such sum or sums of money as shall be equal to the difference between the aggregate freight and passenger rates and excess baggage charges charged and received by it for intrastate service on its lines in the State of North Carolina, and what would have been the aggregate amount for such services at the rates fixed in or under the said acts of Assembly; and further conditioned that, whereas an interlocutory injunction has been issued in the above-entitled cause, by the terms of which the defendants, and each of them, are restrained until the further order of the court, as from said order will appear, now, should such interlocutory injunction be dissolved or vacated as having been wrongfully issued, or because the said acts were improperly restrained, then that the complainant shall pay, or cause to be paid, all damages caused by the issue of such interlocutory injunction and the costs of this cause in connection therewith.

"5. That the complainant shall give to any person purchasing a ticket for intrastate travel on its lines in the State of North Carolina, and to any person purchasing a mileage book for travel on its lines in North Carolina, but not good outside of said State, a transferable coupon, or other written or printed evidence, representing the sum which such person, or his transferee, will, upon a final decision in this cause

upholding the validity of said act in respect to passenger rates, be entitled to receive, out of the cash deposit to be made in the registry of this court in pursuance of the obligation of the bond hereinbefore mentioned. The form of said coupon, or of other written or printed evidence, shall be substantially as follows:

"'SOUTHERN RAILWAY COMPANY.

"'*North Carolina Ticket Claim Coupon.*

"'To be Retained by Passenger. Not Good for Passage.

"'Issued under an order of the Circuit Court of the United States for the Eastern District of North Carolina, in a suit therein pending between Southern Railway Company, complainant, and Franklin McNeill *et al.*, defendants.

"'Southern Railway Company has, on the date stamped hereon, received in connection with the sale of the ticket of corresponding form and number, the rate designated in the tariff of this company in effect on date of sale, for travel between points designated in such ticket within the State of North Carolina, to which ticket this coupon is attached. This coupon is evidence only of a claim for the difference between the amount received and what would have been the amount if the distance covered by said ticket had been paid for at the rate fixed by North Carolina act, approved March 2, 1907, prescribing maximum passenger charges, and is payable only on the order and out of the registry of said court, upon surrender to the court of this coupon, and upon such conditions, if any, as said court may impose, provided it should be finally determined in said suit that the said claim is entitled to such payment.

"'In case the ticket with which this coupon corresponds is presented for redemption it must be presented at general passenger agent's office, Washington, D. C., accompanied by this coupon, either for surrender or for appropriate notation.'

"And the complainant shall give to any person checking baggage to be carried by the complainant between two points both of which are in the State of North Carolina, and which does not pass out of the State en route, and who has paid to the complainant any charge thereon for excess baggage, a transferable coupon or other written or printed evidence, representing the difference between the amount so paid and what would have been paid if there had been an allowance to such person of two hundred pounds of baggage, as provided in said act in respect to passenger rates, such difference to be payable to such person or to his transferee, upon a final decision in this cause upholding the validity of such act in respect to passenger rates, out of the cash to be deposited in the registry of this court, in pursuance of the obligation of the bond hereinbefore mentioned; such coupon, or other written or printed evidence, shall be substantially in the following form:

"'SOUTHERN RAILWAY COMPANY.

"'Issued by Southern Railway Company.

"'*North Carolina Excess Baggage Check.*

"'North Carolina Excess Baggage Claim Coupon to be Retained by Passenger.

"'Issued under an order of the Circuit Court of the United States for the Eastern District of North Carolina, in a suit therein pending between Southern Railway Company, complainant, and Franklin McNeill *et al.*, defendants.

"'Southern Railway Company has received, in connection with the issuance of excess baggage check of corresponding form and number, the amount computed from the excess baggage tariff of this company in effect on July 1, 1907, for the transportation of the passenger's baggage in excess of 150 pounds in weight, between the points designated in such excess baggage check within the State of North Caro-

lina, to which excess baggage check this coupon is attached.

" 'This coupon is evidence only of a claim for the difference between the amount received and what would have been received, had there been an allowance to the passenger of 200 pounds of baggage, as provided in the North Carolina act, approved March 2, 1907; and is payable only on the order, and out of the regstry of said court, upon surrender to the court of this coupon, and upon such conditions, if any, as said court may impose, provided it should be finally determined in said suit that the said claim is entitled to such payment.'

"But nothing herein contained shall be construed as requiring the complainant to issue any such coupon, or any such other written or printed evidence, in connection with the sale of any mileage book, or any ticket, good for an interstate passage or for passage in another State or in other States.

"6. That the complainant shall preserve, to be produced whenever so ordered by the court herein, all canceled tickets and excess baggage check stubs, in respect to which such coupons or other written or printed evidences may have been issued, and may be outstanding, and shall from time to time report to the court, at intervals to be fixed by an order of the court herein, statements showing the revenue by it charged and collected for its services in the North Carolina intrastate transportation of passengers, baggage and freight in excess of the amounts permitted by said act in respect to passenger rates and said act in respect to freight rates. As to each of such shipments of freight the complainant shall report the name of the shipper, the date and place of shipment, and the amount of such excess. The complainant shall from time to time give such further bond or bonds as the court may require to secure the proper payment into the registry of the court of all the amounts which finally it shall be adjudged that it should so pay, under the final decision in this cause.

"7. If it shall be determined herein that the complainant is entitled to the amounts covered by said

bond or bonds, then said bond, or bonds, shall be released and canceled by the court, and, if any amount shall have then been paid into the registry of the court pursuant thereto, then, upon such determination in favor of the complainant, the sum, or sums, so paid into the registry shall be repaid to the complainant without further order of the court herein.

"8. Leave is hereby granted to the complainant, if it be so advised, to make, by supplemental process, as new parties-defendant, any person or corporation, attorney or solicitor, who may attempt or threaten to assert, or enforce, against the complainant or against any of its officers, agents or employees, any alleged right, remedy, penalty or punishment, under either of said acts or otherwise, because of the failure of the complainant, or of any of its officers, agents or employees, to put into effect, or to observe, any rate prescribed in said act in respect to passenger rates, or in said act in respect to freight rates, or any other provision of said acts, or either of them.

"9. That the restraining order heretofore granted in this cause shall be construed as remaining in full force and effect until this interlocutory injunction shall take effect.

"10. It is further ordered that a writ of injunction shall forthwith issue in accordance with this order.

"11. The defendants, having by counsel in open court stated that they regard the answer filed on the said motion for an interlocutory injunction as their answer in this cause, and having given their consent that the same shall be so considered, and that the complainants shall forthwith file a replication thereto, and that the said cause shall be considered at issue, it is now ordered that it be referred to the Hon. W. A. Montgomery, standing master of this court for the Eastern District of North Carolina, to take and to the court report such evidence on any of the issues herein as either party may offer, and to make all needed computations, and report fully to the court the facts thereon; that for that purpose the master shall have the right to sit from time to time in the city of Washington and at any point he may elect in the

State of North Carolina or elsewhere, for the purpose of facilitating the taking of the said evidence, and the said hearing before him, and that he shall report to the court the said evidence and his findings thereon not later than the 25th day of September, 1907. The said master shall determine what time is to be allotted to the complainant for the taking of its evidence and what time shall be allotted to the defendants for the taking of their evidence.

"This cause, by consent of the parties hereto given in open court, is set down for hearing before this court in the city of Asheville, on the first Monday of October, in the year 1907.

"12. Thereupon the complainant tendered its bond to comply with the provisions in respect to a bond in this order fully executed by the complainant, as principal, and by the United States Fidelity and Guaranty Company, as surety, which said bond and the execution thereof and the surety thereto are approved."

In substance, this order provided that with every ticket sold the complainant should give to the purchaser a coupon representing the difference between the then existing rate (3¼ cents for first class and 2¾ cents for second class) and the 2¼-cent rate fixed by the passenger-rate act; and ample provision was made, in case it should be finally determined that the passenger-rate act was valid, that these coupons would be redeemed upon presentation.

The cause thereupon having been matured by consent, it was ordered that it be referred to the standing master, to take and to report to the court such evidence on any of the issues involved in the case as either party might offer, to make all needed computations, and report to the court.

The bond required by the complainant was given and the coupons directed by the court were attached to all intrastate tickets sold in the State of North Carolina after the first day of July, 1907, and delivered to all persons who purchased such tickets.

On the 16th day of July, 1907, an ancillary bill was filed in the Western District of North Carolina, copy of which will

be found in the record, setting forth the original bill in the eastern district and praying for the aid of the Circuit Court of the United States for the Western District in respect to the same matters and for the same purposes as those set forth in the original bill. On that date the Honorable J. C. Pritchard, judge of the Circuit Court of the United States for the Western District of North Carolina, issued a restraining order in accordance with the terms of the restraining order already granted in the eastern district, a copy of which will also be found in the record.

It is to be noticed that the order for the interlocutory injunction was entered June 26, 1907, and that the passenger-rate act was to go into effect July 1, 1907.

Notwithstanding the granting of the said restraining orders and said order of interlocutory injunction, as above described, and the security thereby given the traveling public, there commenced, immediately after July 1, a determined effort upon the part of the authorities of North Carolina to render vain and nugatory the provisions of the order in regard to the sale of tickets for passenger travel within the State of North Carolina, to force the complainant to put into effect the statutory rate of 2¼ cents per mile, and to abandon the protection afforded to it by the terms of the order; to defeat the jurisdiction of the Circuit Court of the United States in respect to the interlocutory relief which had been thereby accorded to the complainant; to compel the complainant, notwithstanding the fact that the court had taken jurisdiction of the cause and of all of the questions involved, to abandon the jurisdiction which it had thus invoked, to submit its cause to the State tribunals of North Carolina, and thus to surrender rights in the premises which are guaranteed to it by the Constitution and laws of the United States.

The steps which were taken by the authorities of North Carolina to this end will, so far as they are shown by this record, now be more particularly stated.

It is shown by the evidence in this case that more than one million five hundred thousand intrastate tickets are sold annually by the Southern Railway Company in North Carolina, and consequently the money penalties prescribed by the passenger act in favor of individuals would amount in one year (a brief period in which to carry to a conclusion the litigation instituted to test the constitutionality of the act) to more than seven hundred and fifty million dollars, and the penalties against the company's officers and employees, in addition to fines which have no maximum limit, might involve imprisonment in jail and convict work on the public roads for more than one million five hundred thousand years. To enforce such penalties pecuniary and degrading would not be law, but destruction.

But such an endeavor was at once set on foot and prosecuted with remorseless vigor.

1. A prosecution was begun in the Superior Court of Wake County, North Carolina, at Raleigh, against the Southern Railway Company and T. E. Green, one of its agents, charging the company and the defendant Green with a misdemeanor for violating the passenger act in selling a ticket at more than the statutory rate, although this was done under the protection of the orders of the United States court, as above set forth. This action, notwithstanding the plea that the United States court had taken jurisdiction of the matter, and that the things done were done in pursuance of its orders, was at once pressed to trial, and resulted in a fine of thirty thousand dollars being imposed upon the company for the sale of one ticket and a fine of five dollars being placed upon its agent. This judgment of thirty thousand dollars against the company has since been reversed by the Supreme Court of North Carolina, on the ground that no such offense against the company as a misdemeanor was created by the act in question, and that this criminal proceeding against the company was entirely lacking in legal warrant.

2. The Governor of North Carolina, on the sixteenth of July, 1907, issued a proclamation to the judges of the State, which appears in the record, in which he declared that the United States court had no jurisdiction, that its order should not be regarded, and asked the judges of the Superior Court of the State to instruct the grand juries and to direct the solicitors of their respective districts to send bills against the agents and employees of the railroads and their higher officers for selling tickets, and he did this notwithstanding the fact that the railroads were proceeding in the manner authorized and protected by the order of the United States court. In this proclamation he stated, among other things, as follows:

> "I desire no conflict between the Federal and State authorities, and there will be none, if the plain letter of the decisions of the Supreme Court of the United States is observed, but as Governor of the State I feel a great wrong is being done the State, and, therefore, desire that *in our own tribunal* this law shall be fairly and fully tested. This can be done by indicting the violators of said law, and letting them come into court making their defense, thus raising the constitutionality of this act, and the right of a Federal judge to abrogate it, before first declaring it unconstitutional.
>
> "As chief executive of the State, I stand ready to aid you in every way possible in enforcing the laws."

3. It is shown by the evidence that shortly prior to the eighteenth of July, 1907, the police justice of Asheville had sought out a person named Wells and had procured him to swear out a warrant before such police justice, charging Wood, the appellee here, and another of the agents of the Southern Railway Company with selling tickets at a rate greater than 2¼ cents prescribed by the passenger act above referred to; that Wood and this other agent were thereupon arrested, but the police justice, hearing that a writ of *habeas corpus* was being sued out for their release, dismissed the

warrants; that later, and on the eighteenth day of July, 1907, learning that the judge of the Circuit Court of the United States had just left Asheville, another warrant was sworn out against the appellee Wood, and he was arrested, and on the following day carried before the police justice, convicted, and sentenced during the absence of the circuit judge; that on the trial before the police justice the coupon directed by the circuit court's order to be given to each purchaser of a ticket was presented, showing that in the particular case in which an offense was charged the defendant Wood was acting under the orders of the Circuit Court of the United States, and, instead of that being regarded as a defense, it was ignored or used as evidence of guilt. The result was his sentence to a term of thirty days' imprisonment, to be worked out upon the public roads of Buncombe county, North Carolina.

The case at bar arises out of his application to the United States Circuit Court for a discharge on a writ of *habeas corpus* from the custody of the sheriff of Buncombe county, who was holding the prisoner with the purpose of requiring him to serve out his sentence. The United States Circuit Court discharged the prisoner. The case is here on appeal from this order. The opinion of Judge Pritchard is reported *Ex parte* Wood, 155 F. R., 190, printed in the appendix. His opinion on the motion for an interlocutory injunction is also printed in the appendix and is reported 155 F. R., 756.

Thus, by a combination of legislative, executive, and judicial departments of the State, an effort was made to inculcate into the unfortunate suitor in the United States court the doctrine of terror and surrender, which, under conditions of helplessness, has biblical endorsement as to its wisdom, but is entirely without legal sanction as to its righteousness:

> "Agree with thine adversary quickly, whiles thou art in the way with him, lest at any time the ad-

> versary deliver thee to the judge, and the judge deliver thee to the officer, and thou be cast into prison. Verily I say unto thee, thou shalt by no means come out thence till thou hast paid the uttermost farthing."

Under the conditions of this settled policy on the part of the authorities of North Carolina to pursue the company and its agents in the State courts for the alleged violation of the statutes of North Carolina, the validity of which was being inquired into in the Circuit Court of the United States, and in respect to which its interlocutory injunction was then in force, a condition of urgency was created which made it necessary, if the orders of the United States court were to have any force and effect, that that court should take steps to protect the company and its employees who were acting under that order. It was for acting in pursuance of this order that the appellee Wood was convicted and was in custody, and it was to vindicate its order, to protect its authority, and to have an orderly trial of the constitutional questions at issue that the circuit court awarded the writ of *habeas corpus* complained of on this appeal.

There was no way of meeting the State's policy of innumerable criminal prosecutions except by putting the disputed rates into effect, and thus entirely abandoning during the litigation the constitutional right which the company was asserting and the benefit of the injunction of the United States court, or else by undertaking the impracticable and impossible task of actually defending, with full detail of evidence, these innumerable prosecutions instituted simultaneously and at widely separated points in the State.

This record, therefore, does not present the case of one test case brought to determine the validity of the jurisdiction assumed by a Federal court, but a set purpose on the part of the State authorities to destroy by criminal proceedings a suitor in a Federal court unless he should abandon that forum.

It will thus be seen that the State, acting by its constituted authorities, in the manner hereinbefore recited, asserted the absolute right to have this constitutional question tried first in its own courts, notwithstanding that the Constitution and laws of the United States give the Federal courts concurrent jurisdiction; and further asserted and acted upon the purpose, by means of intimidation and coercion, exercised through its criminal laws and the imposition of enormous penalties, to force a suitor in a Federal court to surrender a right which had by that court been decreed to it and to abandon a relief to which it had by such court been judicially declared entitled.

Thus is presented the far-reaching and fundamental question whether a State can, through the agency of its criminal laws, coerce a suitor out of a Federal court to which it has the right to resort, and to which it has resorted, under the Constitution and laws of the United States, and can take the use of that suitor's property without compensation for the time between the enactment of a statute by the General Assembly of the State and the final determination of the constitutionality of the statute by the Supreme Court of the United States.

ARGUMENT.

The learned judge rested the order of discharge upon two propositions: (1) that the petitioner was held in custody for an act done in pursuance of an order, process, or decree of a court of the United States; (2) upon the ground that the passenger-rate act, or at least the fourth section, prescribing the penalties for its violation, was void in and of itself, without regard to whether the rates ordained by the act were such as to deprive the Southern Railway Company of its property without due process of law.

The questions arising in this controversy are of the highest importance, and in their discussion we may be indulged in recurring to the very first principles involved in their solution.

THE FIRST QUESTION WHICH ARISES IS AS TO THE POWER OF A STATE LEGISLATURE OVER FREIGHT AND PASSENGER RATES TO BE CHARGED BY A COMMON CARRIER.

The so-called Granger cases are all reported in 94 U. S. They are:

Munn *v.* Illinois, 94 U. S., 113.
C., B. & Q. R. R. Co. *v.* Iowa, 94 U. S., 155.
Peik *v.* Chicago Ry. Co., 94 U. S., 165.
Lawrence *v.* Same, 94 U. S., 165.
C., M. & St. P. R. R. Co. *v.* Ackley, 94 U. S., 179.
W. & S. P. R. R. Co. *v.* Blake, 94 U. S., 180.
Stone *v.* Wisconsin, 94 U. S., 181.

In the first of these cases it was held that the legislature of Illinois had the right to fix the compensation to be charged by the proprietors of public grain warehouses; in the second, that the State of Iowa had the right to fix reasonable maximum rates or charges for the transportation of freight and passengers on the different railroads in Iowa; in the third, that there was a similar power in the legislature of the State of Wisconsin. In these cases it was further held that if the rate was improperly fixed the legislature and not the courts must be appealed to for a change. Substantially similar views were expressed in the other cases.

But while, in the absence of a contract, this court has never, since the Granger cases, doubted the right of a legislature, either immediately or mediately through a railroad commission, to fix rates for the transportation of passengers and property, yet the rule apparently laid down in some of the Granger cases, that there was no appeal from the fiat of a legislature or of a commission acting under its authority, was soon questioned and has been entirely abandoned.

The Fourteenth Amendment to the Constitution of the United States provides, among other things:

> "Nor shall any State deprive any person of life, liberty or property without due process of law, nor

deny to any person within its jurisdiction the equal protection of the laws."

What Mr. Justice Field said in his dissenting opinion in the case of Munn *v.* Illinois, at page 141, has by subsequent decisions of this court been established as the true meaning of the language which we have above quoted from the Fourteenth Amendment.

> "All that is beneficial in property arises from its use, and the fruits of that use; and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. If the constitutional guaranty extends no further than to prevent a deprivation of title and possession, and allows a deprivation of use, and the fruits of that use, it does not merit the encomiums it has received. Unless I have misread the history of the provision now incorporated into all our State constitutions, and by the Fifth and Fourteenth Amendments into our Federal Constitution, and have misunderstood the interpretation it has received, it is not thus limited in its scope, and thus impotent for good. It has a much more extended operation than either court, State or Federal, has given to it. The provision, it is to be observed, places property under the same protection as life and liberty. Except by due process of law, no State can deprive any person of either. The provision has been supposed to secure to every individual the essential conditions for the pursuit of happiness; and for that reason has not been heretofore, and should never be, construed in any narrow or restricted sense.
>
> "No State 'shall deprive any person of life, liberty, or property without due process of law,' says the Fourteenth Amendment to the Constitution. By the term 'life,' as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world.

The deprivation not only of life, but of whatever God has given to every one with life, for its growth and enjoyment, is prohibited by the provision in question, if its efficacy be not frittered away by judicial decision.

"By the term 'liberty,' as used in the provision, something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose and to act in such manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities, and give to them their highest enjoyment.

"The same liberal construction which is required for the protection of life and liberty, in all particulars in which life and liberty are of any value, should be applied to the protection of private property. If the legislature of a State, under pretense of providing for the public good, or for any other reason, can determine, against the consent of the owner, the uses to which private property shall be devoted, or the prices which the owner shall receive for its uses, it can deprive him of the property as completely as by a special act for its confiscation or destruction. If, for instance, the owner is prohibited from using his building for the purposes for which it was designed, it is of little consequence that he is permitted to retain the title and possession; or, if he is compelled to take as compensation for its use less than the expenses to which he is subjected by its ownership, he is, for all practical purposes, deprived of the property, as effectually as if the legislature had ordered his forcible dispossession."

In Railroad Commission Cases, 116 U. S., 307, the Chief Justice, in delivering the opinion of the court, said:

"From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent

> of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward, neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law."

It may be true that in such cases as Dow *v.* Beidelman, 125 U. S., 680, opinion by Mr. Justice Gray, and Budd *v.* New York, 143 U. S., 517, opinion by Mr. Justice Blatchford, there may be found a disposition to adhere to the extreme doctrine of the Granger cases, where rates have been fixed by direct legislative enactment. But to the contrary it has been established by a long line of cases, beginning with C., M. & St. P. R. R. Co. *v.* Minnesota, 134 U. S., 418, and running through Reagan *v.* Farmers' Loan & Trust Company, 154 U. S., 362; Covington Turnpike *v.* Sandford, 164 U. S., 578; Smyth *v.* Ames, 169 U. S., 466; C., M. & St. P. Ry. *v.* Tompkins, 176 U. S., 167; Prout *v.* Starr, 188 U. S., 537, that whether rates to be charged by a common carrier are fixed immediately by a legislature, or mediately through a commission deriving its authority from the legislature, such rates are not binding upon a carrier if they are such as deprive such carrier of his property without due process of law; and it is thoroughly established that "all that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession."

We may therefore assume that there is no difference of opinion upon this first proposition, viz., that the Fourteenth Amendment to the Constitution of the United States prohibits the legislature of a State from either directly or indirectly so fixing the compensation which may be charged by a carrier as to deprive it of a just compensation for the use of its property. All laws and orders of this kind are void because they are in conflict with the Constitution of the United States.

THE NEXT PROPOSITION IS THAT SUCH A LAW OR ORDER DOES NOT SPEAK WITH FINAL AND ABSOLUTELY AUTHORITATIVE FORCE.

The carrier affected thereby has the right to challenge it and call in question its force and validity. This being true, it is obvious that if such an act were to declare upon its face that it should go without challenge, that much at least of the act would be in contravention of the supreme law.

Chicago, M., &c., Ry. Co. *v.* Minnesota, 134 U. S., 458.

There being a right guaranteed by the supreme law of a judicial review of such acts of the legislature, it would be obviously beyond the competency of the legislature to say that there should be no judicial review.

In Smyth *v.* Ames, 169 U. S., at p. 527, Mr. Justice Harlan said:

> " * * * But, despite the difficulties that confessedly attend the proper solution of such questions, the court cannot shrink from the duty to determine whether it be true, as alleged, that the Nebraska statute invades or destroys rights secured by the supreme law of the land. No one, we take it, will contend that a State enactment is in harmony with that law simply because the legislature of the State has declared such to be the case; for that would make the State legislature the final judge of the validity of its enactments, although the Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding (article 6). The idea that any legislature, State or Federal, can conclusively determine for the people and for the courts that which it enacts into the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our

institutions. The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

IT BEING THUS MADE PLAIN THAT THERE IS A RIGHT OF JUDICIAL REVIEW, WHAT MUST BE ITS CHARACTER?

Thus far this court has decided no case in which it has been authoritatively determined what must be the opportunity for judicial review to be afforded to the person affected by such an act. There have, however, been suggestions as to what should be the character of this judicial review, and there have been precedents established determining what methods are allowable in the absence of positive enactment.

In the argument of Mr. Benjamin F. Tracy for the plaintiff in error, at page 523 of Budd *v.* New York, 143 U. S., the point is distinctly made that a law exercising the function of the State to control prices charged by common carriers and others subject to the like regulation, to the end that their charges may be reasonable, must provide judicial forms and judicial machinery for the determination of the question, or at least must leave the question open for examination in the courts, and that an attempt to regulate rates without providing judicial machinery deprives the constituted courts of necessary jurisdiction and is unconstitutional and void.

In C., M. & St. P. Ry. *v.* Minnesota, 134 U. S., 418, the opinion of the court, delivered by Mr. Justice Blatchford, held that where the statute of the State withheld a judicial

review, such statute was void. The concurring opinion of Mr. Justice Miller made this suggestion:

> "That the proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature, or by its commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered."

The mode of judicial review commonly employed is the one thus described, and we need only refer to the cases of Reagan *v.* Farmers' Loan & Trust Company, 154 U. S., 362; Smyth *v.* Ames, 169 U. S., 466; C., M. & St. P. Ry. Co. *v.* Tompkins, 176 U. S., 167, to establish this.

In the Reagan and the Tompkins cases the rates were fixed by a commission; in the Smyth case they were fixed directly by the legislature.

AS A STATE CANNOT CUT OFF THIS JUDICIAL REVIEW DIRECTLY, SO IT CANNOT DO SO INDIRECTLY. IT CANNOT GIVE A RIGHT OF JUDICIAL REVIEW IN FORM AND DENY IT IN SUBSTANCE.

In Cummings *v.* The State of Missouri, 4 Wallace, 277, 324, Mr. Justice Field, in delivering the opinion of the court, said:

> "If the clauses of the second article of the Constitution of Missouri, to which we have referred, had in terms declared that Mr. Cummings was guilty, or should be held guilty, of having been in armed hostility to the United States or of having entered that State to avoid being enrolled or drafted into the military service of the United States, and, therefore, should be deprived of the right to preach as a priest of the Catholic Church, or to teach in any institution

> of learning, there could be no question that the clauses would constitute a bill of attainder within the meaning of the Federal Constitution."

Again the court said:

> "The clauses supposed differ only in that they declare the guilt instead of assuming it. The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the law-maker in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

To similar purport are the observations of Chief Justice Taney. In Bronson *v.* Kinzie, 1 Howard, 310, the question before this court was whether an act of the Illinois legislature, passed subsequent to the execution of a mortgage, giving a period of redemption for one year and preventing any sale unless two-thirds of the amount at which the property had been valued by appraisers shall be paid therefor, is a law impairing the obligation of a contract. The court held that it was.

Chief Justice Taney, in delivering the opinion of the court, said (p. 317):

> "It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of a contract, and the rights of a party

> under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered it with conditions that rendered it useless or impracticable to pursue it."

After quoting an extract from Blackstone, the court said:

> "We have quoted the entire paragraph because it shows, in a few plain words, and illustrates by a familiar example, the connection of the remedy with the right. It is the part of the municipal law which protects the right, and the obligation by which it enforces and maintains it. It is this protection which the clause in the Constitution now in question mainly intended to secure. And it would be unjust to the memory of the distinguished men who framed it, to suppose that it was designed to protect a mere barren and abstract right, without any practical operation upon the business of life. It was undoubtedly adopted as a part of the Constitution for a great and useful purpose. It was to maintain the integrity of contracts, and to secure their faithful execution throughout this Union, by placing them under the protection of the Constitution of the United States. And it would but ill become this court, under any circumstances, to depart from the plain meaning of the words used, and to sanction a distinction between the right and the remedy, which would render this provision illusive and nugatory; mere words of form, affording no protection, and producing no practical result."

Neither of these North Carolina statutes in terms cut off the right of a judicial review. If we assume that the defendants, the North Carolina Corporation Commission and

the Attorney General and the Assistant Attorney General, are, by the statutes of North Carolina, given such power and duties in respect to the passenger and freight law as were conferred upon the Railroad Commission and the Attorney General of Texas in the Reagan case, or the Board of Transportation in the Smyth *v.* Ames case, then it is plain that the Southern Railway Company had the right to apply the appropriate remedy, namely, a bill in equity.

Assuming, as we have said, for the sake of argument, that the defendants here occupy the same (or at least as great a) relation to the laws whose validity is challenged as did the defendants in the other two cases which we have above mentioned, we find that the complainant, the Southern Railway Company, is a citizen of the State of Virginia; that the defendants are all citizens of North Carolina, and that the suit is one arising under the Constitution of the United States and involving more than $2,000. We have, then, a clear case for a Circuit Court of the United States which by the acts of Congress has been given jurisdiction to entertain this suit. The Constitution of the United States (article 3, sections 1 and 2) provides:

> "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."
>
> "The judicial power shall extend to all cases in law and equity, arising under this Constitution and to controversies between citizens of different States."

And the act of Congress ~~of March 3, 1875, 18~~ 23 Stat. ~~170~~ 434 C 866 ~~c. 137~~, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes," provides as follows:

> "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at

> common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, * * * or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid."

This, now, is a case in equity. The circuit court, whose jurisdiction was invoked, has vested in it the judicial power of the United States in this case in equity, arising, as it does, under the Constitution of the United States, and involving, as it does, a controversy between citizens of different States.

What, then, is this judicial power which the Constitution of the United States has conferred upon the Supreme Court of the United States and such courts as Congress may from time to time ordain and establish? In other words, what is the judicial power of the circuit court of the United States sitting in equity and determining a cause over which it has jurisdiction? Jurisdiction is the right to hear a case. Judicial power is exercised in the case over which the court has jurisdiction, and is the power to hear and determine and carry into effect the determination. Now, the judicial power of a court of equity under a bill asking an injunction includes the right to grant an interlocutory as well as final relief. The judicial power is just as potent to grant the one kind of relief as the other kind of relief.

A circuit court of the United States having jurisdiction of a case has all the judicial power of a court of equity, if the case be one in which equitable relief is appropriately sought.

In Russell *v.* Farley, 105 U. S., 433, the power of the court of equity on the subject of interlocutory injunctions is ably discussed by Mr. Justice Bradley. The court there pointed out that it is competent for a court of equity to grant an interlocutory injunction upon such terms as seem to it discreet. As it can grant or withhold such a remedy, so also it can grant the remedy upon such terms for the

protection of the defendants by the complainants as it may see fit to impose. Pending the cause, it can relieve against the terms so imposed. So also the Federal court in equity can, where it has granted an interlocutory injunction, dissolve the same at the hearing and cause its reinstatement pending the appeal. This was done in the notable case of Cotting *v.* Kansas City Stock Yards Company, 183 U. S., 79, and is embraced in equity rule 93.

Strangely enough, it is asserted that the operation of a State law cannot be suspended by the order of a Federal court. It is difficult to understand what is meant by this. If a law of a State or of Congress is contrary to the Constitution, it is no law at all. It can be declared to be no law by the action of any judicial tribunal having authority to determine the matter. But it is said that a State law cannot be declared void except by a determination of a court of final jurisdiction. Again, it is difficult to understand what is meant by this. Surely the court of first instance, in which the law is challenged as unconstitutional, has the same right to declare it to be a void law or no law at all as has the court of ultimate jurisdiction. The judgment of one may not be as final as the other. But to say that a court of first instance cannot declare a law unconstitutional is simply to say that it must decide in every case that the law is constitutional, whatever may be its own opinion on the subject, and leave to the ultimate tribunal the solution of the question. But appellate tribunals are not meant to decide matters in the first instance, but to review decisions of courts which have already passed upon the questions involved. Nor is there any difference between the judicial power of the court of equity in suspending the operation of a law by temporary injunction and declaring such law to be void by final decree.

A restraining order must be obeyed until modified.

Pokegana *v.* Klimath, 86 F. R., 538.

Ullman *v.* Ritter, 72 F. R., 1000.

In re Debs, 158 U. S., 566, arose out of the violation of an interlocutory order.

The root of this objection is a harking back to the theory, long since discarded, that a court should not declare a legislative act void because of its conflict with the Supreme law of the State, its Constitution, or that of the United States. It was once insisted that the legislature was the final judge whether its acts were in accordance with the Constitution. There was a strong disposition to regard the assumption by the courts of the authority to determine this question for themselves a mere usurpation.

There can be no doubt that the practice of suspending or holding in abeyance acts of the legislature is a most common and every-day practice of the courts.

Thus a law is assailed because it levies a tax in violation of a contract, and a bill is filed to enjoin its enforcement. A temporary injunction is constantly employed to hold matters in *statu quo*.

Bank of Ky. *v.* Stone, 88 F. R., 383.

So of a law assailed because it imposes a tax which violates the Fourteenth Amendment. The same course is pursued.

Pacific Express Co. *v.* Siebert, 44 F. R., 310.

Why is a law fixing rates any more sacred? The basis for such a law is simply this, that the public has a right to use the property of a common carrier for a reasonable compensation, which is only a qualified right in that property. What the legislature says is evidence more or less forceful of what is reasonable compensation. But this qualified right of the public is no more sacred than the complementary right of the carrier. One right or the other must prevail *pendente lite*.

Take an ordinary case. A bill is filed to enjoin a defendant from erecting a house upon a plot of ground belonging to him, because it is said its erection will interfere with

some right of the plaintiff. A temporary injunction is granted, and then either made final and an appeal taken, or dissolved and an appeal taken with an order continuing it in force pending the appeal. All this may have been done without bond. The bill is dismissed. Here, then, is a clear right suspended during the whole period of litigation.

Now, if such an absolute right as is supposed can be suspended or held in abeyance pending an inquiry into its existence and validity, the qualified right can, with equal justice, be suspended or held in abeyance.

The fact that one right may be of more importance than the other is in no way material. A small right is equally sacred with a big right. In fact, there is no such thing as a little right as contradistinguished from a big right. A right is a right.

At last it is a question of judicial power, and the judicial power of issuing temporary injunctions is as well established as the judicial power to grant final injunctions, and the judicial power of the court of first instance to issue a temporary injunction and then a permanent injunction is just as clear as that of the ultimate tribunal to determine finally the merits of the controversy. In the case at bar the terms imposed by the Circuit Court of the United States were such as to absolutely prevent any wrong or pecuniary loss to any citizen of North Carolina. The State had no pecuniary interest in the matter. The citizen who dealt with the railroad being fully protected, equity was fully accomplished.

The right and power of the court to suspend, by interlocutory decree, the operation of a statute, alleged to be unconstitutional, seems to be definitely settled by the case of Smyth *v.* Ames, 169 U. S., 466. The case of Cotting *v.* Kansas City Stock Yards Co., 183 U. S., 79, is a still more striking illustration, because here the circuit court was of opinion that the act was constitutional, and yet enjoined its enforcement pending an appeal to the Supreme Court of the United States, and this action of the circuit court was expressly approved by this court in its opinion.

THE PRINCIPLE THAT STATE STATUTES MAY BE SUSPENDED BY TEMPORARY INJUNCTION HAS BEEN FREQUENTLY APPLIED IN THE INFERIOR FEDERAL COURTS, AS IS SHOWN BY THE FOLLOWING DECISIONS.

In State *v.* Lagarde, 60 Fed., 186, it was held that a preliminary injunction would be granted to restrain a board of agriculture from instigating and instituting actions, criminal or civil, to enforce a State law regulating the sale and purity of commercial fertilizers, and this whether the statute was interpreted as giving no authority to the board in the premises, or as conferring authority in violation of the Federal constitution.

In Central Trust Co. *v.* Citizens St. R. Co., 80 Fed., 218, it was held that a suit would lie for a preliminary injunction to enjoin a district prosecuting attorney from instituting criminal proceedings under an act to amend an act to provide for the incorporation of street railroad companies and declaring in part that "it shall be unlawful for any company organized under the provisions of this act and owning, controlling, running or operating any street railroad or system of street railroads in any city having a population of 100,000 or more, according to the United States census of 1890, or any officer, agent, servant or employee of such company to demand, charge, receive or collect from any passenger upon its road or system of roads a cash fare of more than three cents for any one trip or passage upon the same, and for any violation of the provisions of this section, such company, officer, agent or employee, shall, upon conviction thereof, be fined in any sum not less than fifty dollars and not more than five hundred dollars," the statutory provision being declared to be contrary to the State constitution on the ground that it was special and local. In 82 Fed., 1, a subsequent motion to dissolve the injunction was denied, it being held that the provision was not only contrary to the constitution of the State on the ground mentioned above, but was in violation of the Federal constitution on the ground that it impaired the charter rights of the complainant.

In this case the court said (p. 226):

> "But counsel for defendants insist that, at all events, a preliminary injunction ought not to issue. They say if the defendant railroad company will obey the law, and reduce its fares to three cents, the damage prior to final hearing will be inconsiderable or nothing. But, suppose the alleged law be invalid, and suppose the defendant railroad company declines to obey it. In the Reagan case, above cited, the same argument could have been used, yet there the preliminary injunction was issued. So, also, in Lottery Co. *v.* Fitzpatrick, wherein is discussed at length the question whether or not the preliminary injunction should issue. How can the point as to the validity of the amendment of 1897 be presented on any subsequent hearing more distinctly than on this? My opinion is that, where proceedings in effect destructive of a vested property right are threatened by a defendant in official position under color of a void statute, the preliminary injunction ought to issue."

In Metropolitan Life Ins. Co. *v.* McNall, 81 Fed., 888, a temporary injunction was granted to enjoin a State superintendent of insurance from revoking the license of an insurance company to do business in the State, in a case where the statute, under which the defendant claimed to act, if it conferred such authority, was unconstitutional.

In Cobb *v.* Clough, 83 Fed., 604, a temporary injunction was granted to restrain the governor, State auditor, and treasurer as a board of land commissioners from disposing of, as school lands, lands claimed by complainants under a prior land grant, as directed by a statute alleged to be unconstitutional, and to restrain the governor, auditor and attorney general from commencing actions against the grantees of the railroad company or persons having contracts with respect to the lands, as was also directed by the statute referred to.

In Fairfield Floral Co. *v.* Bradbury, 87 Fed., 415, it was held that where an injunction is asked to restrain a Federal officer from continuing a course of action, entered upon in

pursuance of a Federal statute (in this case a local postmaster withholding letters and refusing to pay money orders under an act of Congress, claimed to be unconstitutional, relating to non-mailable matter), and the court on preliminary injunction is in doubt as to the constitutionality of the statute, a preliminary injunction will issue when it appears to be the best way of doing justice pending the final hearing.

In Union Pac. Ry. Co. *v.* Alexander, 113 Fed., 347, a preliminary injunction was granted to restrain respondents (members of the board of equalization) from transmitting to the county clerks of the State any statements of assessments made under the provisions of a State revenue act on the ground that the act was in violation of the State Constitution.

The W. J. Hingston Co. *et. al.*, 144 Fed., 560, was a case where the jurisdiction in admiralty over a certain vessel depended on the invalidity of a State law. The jurisdiction was retained pending decision as to validity of the State law, thus temporarily annulling it.

In Globe Elec. Co. *v.* Andrews *et al.*, 144 Fed., 871, a temporary injunction was granted against the enforcement of an inspection law of Wisconsin, which was held void because a regulation of interstate commerce.

In Consolidated Gas Co. *v.* Mayer, 146 Fed., 150, an injunction *pendente lite* was granted to the complainant, restraining the attorney general of New York and the district attorney from enforcing or attempting to enforce, by criminal prosecutions or otherwise, two acts of the legislature fixing the price to be charged for gas, and providing for the imposition of penalties upon any person or corporation making charges for gas in excess of the rate fixed.

In Crescent Liquor Co. *v.* Platt, 148 Fed., 894, the court held unconstitutional a West Virginia statute subjecting to criminal punishment any agent of an express company delivering intoxicating liquors and granted a temporary injunction against the express company, restraining it from complying with the statute.

THE NEXT QUESTION IS, THE CASE BEING ONE OF WHICH THE CIRCUIT COURT OF THE UNITED STATES HAD JURISDICTION, AND THE CIRCUIT COURT HAVING JUDICIAL POWER AMPLE TO JUSTIFY ITS ORDERS, WERE THE DEFENDANTS CAPABLE OF BEING SUED?

It is claimed that they were not and that the suit was against the State, and therefore a case not within the judicial power of the United States under the terms of the Eleventh Amendment. The fact that the defendants were State officers by no means proves that the suit was against the State. On the contrary, the cases which have justified the invoking of the jurisdiction by a private citizen against a State officer are so numerous in this court that it would be vain to cite any of them. For the purpose of this case, it seems to us that we need only take such cases as the Reagan case and the Smyth *v.* Ames case, with its complement, Prout *v.* Starr, and compare the statutes involved in those cases with the statutes involved here. The statute in the Reagan case is given in the report of the case. The pertinent parts of the statute in the Smyth *v.* Ames case we print in the appendix in parallel columns with the pertinent parts of the North Carolina statutes. We also call attention to the North Carolina statutes as given in the opinion of the Circuit Court, printed in the appendix. It will not do to say that a State officer has not a special duty to perform in reference to a particular enactment unless such duty is imposed in that very enactment. It is equally his special duty if it is prescribed in other enactments relative to the same subject.

In the case of Smyth *v.* Ames the act of the Nebraska legislature involved simply fixed the rates. Other statutes were looked to, and it was determined that by these other statutes the duty of enforcing observance of these rates was vested in the Board of Transportation and the Attorney General, and therefore the members of this Board of Trans-

portation and the Attorney-General were appropriate defendants. The duties enjoined upon the members of the Board of Transportation in Smyth *v.* Ames were certainly no clearer or more distinct in reference to the enactments therein than the duties enjoined upon the North Carolina Railroad Commission, the Attorney General, and the Assistant Attorney General in reference to the enactments in question in the case at bar.

In one class of cases this court has determined that a suit against the officers of a State is a suit against the State, and in another class of cases it has determined that a suit against the officers of a State is not a suit against the State.

The class of cases in which suits against State officers are regarded by this court as suits against the State are illustrated by the Louisiana and Virginia Debt cases, notable among which is the case of *In re* Ayers, 123 U. S., 443, and by the case of Fitts *v.* McGhee, 172 U. S., 516.

1. As to the distinction between such cases as the State Debt cases which are, and the cases in which suits against State officers are not, suits against the State.

The line of distinction between these two classes of cases is this: Wherever an attempt is made by means of a suit against a State officer to coerce the State into a compliance with its contract, the suit is regarded as a suit against the State, the ultimate and substantial object of the suit being regarded by the court, and it being determined that the only effect of permitting the suit would be, either directly or indirectly, to require the specific performance by the State of its contractual obligations. This class of cases is illustrated by the Louisiana and Virginia Debt cases.

In the case of *In re* Ayers, *supra,* this court says (page 502):

> "Admitting all that is claimed on the part of the complainants as to the breach of its contract on the

part of the State of Virginia by the acts of its General Assembly referred to in the bill of complaint, there is, nevertheless, no foundation in law for the relief asked. For a breach of its contract by the State it is conceded there is no remedy by suit against the State itself. This results from the Eleventh Amendment to the Constitution, which secures to the State immunity from suit by individual citizens of other States or aliens. This immunity includes not only direct actions for damages for the breach of the contract brought against the State by name, but all other actions and suits against it, whether at law or in equity. A bill in equity for the specific performance of the contract against a State by name it is admitted could not be brought. In Hagood *v.* Southern, 117 U. S., 52, it was decided that in such a bill, where the State was not nominally a party to the record, brought against its officer and agents, having no personal interest in the subject-matter of the suit, and defending only as representing the State, where 'The things required by the decree to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State,' the court was without jurisdiction, because it was a suit against a State.

"The converse of that proposition must be equally true, because it is contained in it; that is, a bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also, necessarily, be a suit against the State. In such a case, though the State be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the State. Such is the precise character of the suit in the circuit court against the petitioners in which the order was made, the violation of which constitutes the contempt for which they have been committed to the imprisonment from which they seek delivery by these writs."

Page 504:

> "But where the contract is between the individual and the State, no action will lie against the State, and any action founded upon it against defendants who are officers of the State, the object of which is to enforce its specific performance by compelling those things to be done by the defendants which, when done, would constitute a performance by the State, or to forbid the doing of those things which, if done, would be merely breaches of the contract by the State, is in substance a suit against the State itself, and equally within the prohibition of the Constitution."

The court, at page 503, points out that the distinction is obvious between cases involving the contractual obligations of a State and cases in which the rights of persons and of property are invaded, or sought to be invaded, under the authority of an unconstitutional State law, the court saying, at page 506:

> "But this [referring to what has been said about enforcing directly or indirectly the contracts of a State] is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the State, are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest. In respect to the latter class of cases we repeat what was said by this court in Board of Liquidation *v.* McComb, 92 U. S., 531, 541: 'A State, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who

will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void.' * * *

"Nothing can be interposed between the individual and the obligation he owes to the Constitution and laws of the United States, which can shield or defend him from their just authority: and the extent and limits of that authority the Government of the United States, by means of its judicial power, interprets and applies for itself. If, therefore, an individual, acting under the assumed authority of a State, as one of its officers, and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character and subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."

The line of demarcation here set out has been pursued by this court throughout its decisions, and, in accordance with this distinction, this court has invariably held that where a State officer is attempting, or will attempt unless restrained by the court, to invade the property rights of a citizen, or to harass him in respect to them, by seeking to enforce against him confiscatory charges, and thus to deprive him of reasonable compensation for his property, he has no right to interpose anything between himself and the obligation he owes to the Constitution and laws of the United States; for nothing can shield or defend him from their just

authority, and in making an attempt to violate this supreme law he is stripped of his representative character. Therefore a suit against him is not a suit against the State.

Reagan *v.* Farmers Loan & Trust Co., 154 U. S., 362.
Smyth *v.* Ames, 169 U. S., 466.
Chicago, Milwaukee & St. Paul Ry. *v.* Tompkins, 176 U. S., 167.
Prout *v.* Starr, 188 U. S., 537.

This distinction has been well expressed by Justice Bradley in his dissenting opinion in the Virginia Coupon cases, the soundness of which has never been denied, although its application to the cases in which it was delivered was not conceded:

> "But, then, it will be asked, has the citizen no redress against the unconstitutional acts or laws of the State? Certainly he has. There is no difficulty on the subject. Whenever his life, liberty or property is threatened, assailed or invaded by unconstitutional acts, or by an attempt to execute unconstitutional laws, he may defend himself, in every proper way, by *habeas corpus*, by defense to prosecutions, by actions brought on his own behalf, by injunction, by mandamus. Any one of these modes of redress, suitable to his case, is open to him. A citizen cannot, in any way, be harassed, injured or destroyed by unconstitutional laws without having some legal means of resistance or redress. But this is where the State or its officers moves against *him*. The right to all these means of protection and redress against unconstitutional oppression and exaction is a very different thing from the right to coerce the State into a fulfillment of its contracts. The one is an indefeasible right, a right which cannot be taken away; the other is never a right, but may or may not be conceded by the State; and, if conceded, may be conceded on such terms as the State chooses to impose.
>
> "All the cases that are cited from the books in which redress has been afforded to individuals by the courts against State action are cases arising out of

> the first class, and not out of the second; cases of State aggression, and not of refusal to fulfill obligations. The case of Osborn against The United States Bank, 9 Wheat., 737, was of that class; so was that of Dartmouth College *v.* Woodward, 4 Wheat., 518; so was that of New Jersey *v.* Wilson, 7 Cranch, 164. So, if looked at carefully, were those of Davis *v.* Gray, 16 Wall., 203, and the Board of Liquidation *v.* McComb, 92 U. S., 531; although these last cases approach nearer to suits against a State than any others which have received the sanction of this court. In all these cases the State has attempted to do some unconstitutional act injurious to the party, or some act which it had entered into a contract not to do; and redress was sought against such aggressive act; they, none of them, exhibit the case of a State declining to pay a debt or to perform an obligation, and the party seeking to enforce its performance by judicial process."
>
> Virginia Coupon cases, 114 U. S., 335, 336.

In this connection, it must be noted, and it follows as a corollary, that when *an act of aggression* against property rights is attempted by an officer, he is not entitled to protection on the plea that it was discretionary with him whether or not he should inflict or attempt the injury. It is true that a court cannot require by mandamus an act to be done that is discretionary. In order to justify the issuance of a mandamus, the act to be enforced must be ministerial, and the officer must not be clothed with a discretion whether he will or will not do the act. But a court of equity will never hesitate to prevent injury to property because the person attempting to inflict it was at liberty to do or not to do it. The rights of courts of equity to intervene against the officers of a State to prevent injury to property is based upon the necessity for such action in order to prevent the threatened injury. Unquestionably an injunction would issue to prevent an individual, not an officer, from inflicting injury upon property. Such an individual could not justify on the ground that he was a free agent, and at liberty to do or not

to do the act, and when an officer undertakes to inflict the same injury, and he attempts to justify on the ground of an act which is unconstitutional, but which leaves it discretionary with him whether he will do the act or not do it, equity will only inquire whether he intended, or is attempting, to inflict the injury, and if he is, he will be restrained, notwithstanding the fact that he has a discretion in the matter. In such a case equity will not be coercing his discretion. He will have determined that discretion by the attempt to inflict the injury, and equity will interpose to prevent it, because the substantial thing that equity proposes to do is to prevent a threatened injury.

2. As to the distinction between Fitts *v.* McGhee, 172 U. S., 516, in which a suit against a State officer was considered a suit against the State, and the cases in which suits against State officers are not suits against the State.

In Fitts *v.* McGhee it was determined that none of the defendants was charged by law with any special duty in connection with the act which was claimed to be unconstitutional. There was not even a plausible pretext for any claim that either of the defendants, the Attorney General or the solicitor, was, by virtue of any State power, or otherwise, attempting, or about to attempt, to invade the property rights of the complainant by enforcing against it the provisions of an unconstitutional statute. The case therefore presented the bald contention that simply because these defendants were officers of the State, although no duty was imposed upon them by any statute which would make it certain that they would attempt and were about to attempt a trespass against the complainant's property, and although there was no basis for any assumption that in any capacity they were attempting, or about to attempt, such trespass, they were proper and sufficient defendants to a suit to test the constitutionality of

the act complained of. This follows from the fact, which the bill shows, that the indictments sought to be enjoined were found under an act not alleged to be unconstitutional. There being no unconstitutional invasion of property rights, or any attempt or purpose on the part of these defendants by virtue of an unconstitutional statute to invade a property right, nothing was left in the suit except the representative capacity of these defendants, and in that capacity they represented simply the State. Under these circumstances this court held that a suit against defendants thus related to the State and thus unrelated to any effort to unconstitutionally invade the property rights of the defendants, was in substance and effect a suit against the State. If, however, it had appeared that the Attorney General and solicitor, by virtue of power conferred upon them by the State of Alabama, would attempt or were about to attempt to invade illegally the property rights of the complainant, it could hardly be successfully contended that a court of equity, the basis of whose jurisdiction is the protection of property, would have withheld its protection from such unconstitutional invasion of property rights. The distinction therefore between the case of Fitts *v.* McGhee and that class of cases in which suits against officers of the State are by this court considered not to be suits against the State is this: That in Fitts *v.* McGhee the defendants were not attempting and were not about to attempt to invade the property rights of the complainant under the alleged authority of an unconstitutional statute. Nor was there any legislation on the part of the State of Alabama shown to the court that established such a special relation of these officers to the unconstitutional act, or that imposed upon them such positive duty in respect to it as would justify the court in concluding that they would obey the positive mandate of the statute and attempt to invade the property rights of the complainant. On the other hand, the cases which this court has considered suits against officers of a State, and not suits against the State, have

been those in which either it was shown to the court that property rights were about to be invaded under the authority of an unconstitutional act, or in which there was such positive mandate in the statutes of the State as would directly connect the defendants sued with, and justify the court in concluding that they were about to attempt, an invasion of the property rights of the complainant under the authority of an unconstitutional law.

In the case at bar this suit is justified against these defendants, both by the positive allegation of the bill that these defendants were about to invade its property rights under the color of authority contained in an unconstitutional statute and also by the statutes of North Carolina; among others, by section 1113 of the Revisal of 1905, which made it the absolute duty of the Commissioners to proceed against this complainant if it should violate any alleged laws, and made it the duty of the Attorney General and the Assistant Attorney General to take steps to make such proceedings of the Commissioners effective.

That statute is as follows:

> "The commission, whenever in its judgment any corporation has violated *any law*, shall give notice thereof in writing to such corporation, and, if the violation or neglect is continued after such notice, shall forthwith present the facts to the Attorney General, who shall take such steps thereon as he may deem expedient."

As stated before, it is not necessary that these duties be imposed by the act, the constitutionality of which is complained of. It is sufficient if they existed by virtue of any law of the State. This was held in the case of Consolidated Gas Co. v. Mayer, 146 Fed., 150, 154, where it specifically appears that the duty of the Attorney General with regard to the enforcement of the statute complained of in that case existed by virtue of his general duties, imposed by a separate and antecedent statute. This merely follows Smyth v.

Ames, 169 U. S., 466. But in the case at bar the very statutes the constitutionality of which is here complained of imposed specific duties upon the Corporation Commission in respect to them. By section 5 of the Freight act it is provided:

> "The Corporation Commission is hereby directed to prepare and publish the tariff of rates, charges and tolls to be charged and collected by railroad companies in this State, as authorized by this act, on or before July 1, 1907."

Under this requirement it was necessary for the Corporation Commission to ascertain the specific rates permitted by the act in respect to any particular road, and to publish them as required by the act.

By section 2 of the Passenger act it is provided that the North Carolina Corporation Commission shall publish the rates fixed by this act for the several railroad companies operating in this State on or before the first day of June, 1907, and by section 3 it is provided that it shall be the duty of the railroad company to keep on sale mileage books of one thousand miles, at such railroad ticket offices in the State as shall be named and designated by the Corporation Commission of North Carolina. It therefore became the duty of the Corporation Commission to classify the roads according to the general requirements and definitions of that act, and to ascertain which one of those roads was entitled, by reason of its length, or by reason of the time of its construction, or by reason of its ownership, control, or operation by some other road, to charge some particular rate, and to designate the rate in respect to such road, and to publish it, as required by the statute.

It will thus be seen that there were direct, specific, and mandatory duties incumbent upon the Corporation Commission of North Carolina, not only by virtue of the general statute above alluded to, but by virtue of these special

statutes, and that there were also special duties in respect to these statutes incumbent upon the Attorney General and the Assistant Attorney General by virtue of the statute laws of that State. All of these defendants, therefore, were much more closely related to the enforcement of the acts complained of in this case than were the official defendants in the case of Smyth *v.* Ames, where the only duties incumbent upon the Commission or the Attorney General were duties in respect to the supervision and control of railroad corporations, and the duties of the Corporation Commission of North Carolina were just as direct in respect to these matters as were the duties of the Railway Commissioners in the case of Chicago Railway Co. *v.* Dey, 35 Fed., 866, in which the duties of the commissioners were to publish the rates, and as the duties of the railroad commissioners in the case of Northern Pacific Railway Company *v.* Keyes, 91 Fed., 47, in which the duties of the commissioners were likewise to publish the rates.

It can no longer be successfully contended that the Attorney General of a State charged with special duties in respect to the enforcement of an unconstitutional statute cannot be made a party defendant to a suit and enjoined. This was done in the case of Smyth *v.* Ames, where one paragraph of the injunction approved by this court read as follows:

> "And that the Attorney General of this State be in like manner enjoined from bringing, aiding in bringing, or causing to be brought, any proceeding by way of injunction, mandamus, civil action, or indictment against said companies or either of them, or their receivers, for or on account of any action or motion on their part commanded or forbidden by the said act."
>
> Smyth *v.* Ames, 169 U. S., 477.

It is true that it is said by this court in the case of Prout *v.* Starr, 188 U. S., 544, that the defendant was included in the bill in the Smyth *v.* Ames case as the Attorney General

of the State, but that was because he was one of the members of the board of transportation, which was directed to enforce the provisions of the act. It was not necessary to say this in the Prout *v.* Starr case, nor does it seem to be entirely an accurate statement of the fact, because the Attorney General was included as a defendant in the Smyth *v.* Ames case, not only as a member of the Board of Transportation, but also in his capacity as Attorney General. And in the case of Prout *v.* Starr the injunction is ordered against the Attorney General as Attorney General, and not because he was a member of the Board of Transportation. He is thereby enjoined from collecting penalties under the provisions of a statute judicially determined to be void. Suits and injunctions against the Attorney General of a State have been upheld in the recent cases of Railroad Commission of Louisiana *v.* The Texas & Pacific Co., 144 Fed., 68 (C. C. A.), and Consolidated Gas Company *v.* Mayer, 146 Fed., 150.

It is also true that in the Cotting case, 183 U. S., the Attorney General was dismissed as a party to the suit, but that was done without passing on the question, and in the later case of Prout *v.* Starr, 188 U. S., 544, the Attorney General was expressly enjoined. It can hardly be successfully contended that an Attorney General may be enjoined from bringing criminal suits against a complainant to enforce an unconstitutional law, if, in addition to being Attorney General, he is a member of the Board of Transportation, but that he cannot be enjoined from bringing such suits if he is not a member of the Board of Transportation. The substantial thing that is done is to enjoin him from invading the property rights of a complainant under the color of an unconstitutional act, and he can no more justify such invasion by the plea that he is the Attorney General of the State than he can by the plea that he is a member of the Board of Transportation.

It is, therefore, submitted that the defendants to this bill are proper defendants. That being so, the court has juris-

diction not only of the defendants, but of the whole subject and of all of the questions involved.

THE CIRCUIT COURT OF THE UNITED STATES HAVING FIRST TAKEN JURISDICTION OF THIS CONTROVERSY, IT WAS NOT COMPETENT FOR THE STATE COURTS OF NORTH CAROLINA THEREAFTER TO ASSUME CONTROL OF THE SAME.

There are many cases in this court laying down and illustrating the rule that where a suit is pending in a court of general jurisdiction involving the administration of an insolvent or trust estate or the enforcement of mortgages or other liens upon property, no other court of concurrent jurisdiction can thereafter assume control over the same controversy. This rule is not confined to cases in which the possession of property has been actually taken, as by the appointment of a receiver in the court first assuming jurisdiction, but is also extended to cases where, in order that there may be a complete settlement of the matter in dispute, the taking possession of such property will become necessary.

We need only refer to one of the late cases on this subject—Farmers Loan & Trust Company *v.* Lake Street Elevated R. R., 177 U. S., 51.

But this is not the only case in which the principle is upheld that the right to exclusive control over a matter in controversy belongs to the court first assuming jurisdiction.

The opinion of Mr. Justice Field, sitting at the circuit with Circuit Judge Sawyer and District Judge Sabin, discusses this question more at large than any other which we have been able to find (Sharon *v.* Terry, 36 F. R., 338), the discussion of this particular question being found beginning at page 354.

The facts of that particular case are well illustrative of the doctrine. William Sharon, a citizen of the State of Nevada, instituted in the Circuit Court of the United States for the District of California a suit in equity against Sarah Althea

Hill, alleging that the defendant was in the possession of a forged paper which purported to be an acknowledgment under the California statute of a marriage between the complainant and the defendant. The relief asked was that the paper should be delivered up for cancellation. After the defendant had been served in this case she brought a suit in the Superior Court of San Francisco for a divorce, claiming that the paper which was the basis of the controversy in the first case was a valid declaration of marriage between herself and the defendant; and in her suit she claimed alimony and a share in the community property which she alleged had been earned after the marriage. The case proceeded to judgment in the State court, where it was held that there had been a valid marriage between the parties, and a decree was rendered for divorce and alimony. This judgment was pleaded in the suit in the Circuit Court of the United States as conclusive of the question. Notwithstanding this plea, however, the Circuit Court of the United States examined the facts and determined that the paper was a forgery, and that there had been no marriage, and thereupon directed that the paper should be delivered up for cancellation, and that the defendant, Sarah Althea Hill, should make no claim under it.

The complainant, Sharon, died pending the submission of the cause in the Federal court. The judgment was entered *nunc pro tunc* as of the date of submission. Subsequently certain bills of revivor were filed by his executor and the trustee of Sharon's estate for the purpose of carrying into execution the decree and declaring inoperative and void the judgment in the State court. This relief was granted. The court held that the true controversy was over the validity of the paper, and that as the Federal court had first assumed jurisdiction of this controversy, it was not competent for any court of concurrent jurisdiction, by a proceeding subsequently brought, to determine the same.

The authorities are fully reviewed. The rule is said to be one of general application, subject only to two exceptions: First, where the same plaintiff has asked in the different suits a determination of the same matter; second, where the cases are upon contracts or obligations which, from their nature, are merged in the judgment rendered, the subject upon which the first suit is founded having thus ceased to exist. Neither of these exceptions need be here considered.

In the course of his opinion Mr. Justice Field quotes from Taylor *v.* Taintor, 16 Wall., 366, where this court, speaking by Mr. Justice Swayne, said (p. 370):

> "Where a State court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other until its duty is fully performed, and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. It is, indeed, a principle of universal jurisprudence that where jurisdiction has attached to person or thing, it is—unless there is some provision to the contrary—exclusive in effect until it has wrought its function."

There can be no doubt that the purpose of the suit brought by the Southern Railway Company in the Circuit Court of the United States was to have a comprehensive decree upon the subject of the validity of the passenger and freight acts. They were challenged as unconstitutional, and the court was asked to investigate fully the matter, to the end that it might determine whether the complainant's assertion that the acts were invalid and violated its rights under the Fourteenth Amendment to the Constitution was in fact true. That being the case, it became thereafter incompetent for any other tribunal to assume jurisdiction of this very controversy. The prosecution of the Southern Railway Company or its agents under the passenger-rate law was undoubtedly the assumption by the State court of an inquiry into and a determination of the very matter which had thus been placed within the control of the Circuit Court of the United States.

We further submit that the case of Harkrader *v.* Wadley, 172 U. S., 148, fully sustains the opinion of Judge Field in the case above cited, and the contention which we are here making. Stated briefly, that case involved the question whether a suit in equity in a Federal court, in which it was claimed that Wadley had become liable to the creditors of a certain bank through the wasting of its assets, prevented the indictment of Wadley in a State court for the crime of embezzling the funds of the same bank. This court held that it did not; that the matters in issue were not at all the same. Among other cases cited by the court is that of Mayor of York *v.* Pilkington, 2 Atkins, 302. In the cited case the plaintiffs, in a chancery bill and cross-bill to establish in equity their sole right of fishing in a certain stream, while their bill was still pending, caused the defendant to be indicted in the York Criminal Court for a breach of the peace for such fishing. Lord Hardwicke awarded an injunction to restrain the plaintiff from all further criminal proceedings in other courts. In this Atkins case the controversy was over the right of fishing. This was the subject of inquiry in the bill in equity, and Lord Hardwicke held that the jurisdiction of that court would be maintained as exclusive, even against an indictment subsequently found. There seems to us to be a perfect analogy between that case and the one at bar.

The Supreme Court in the Harkrader case, goes on to point out that the fallacy in the argument of Wadley was the assumption that the same right was involved in the criminal case in the State court and in the equity case pending in the Federal court. The court stated that it was obvious that the civil liability of Wadley to indemnify the plaintiffs in the equity suit, by reason of losses occasioned by his misconduct as an officer of the bank, was another and a very different question from his criminal liability to the Commonwealth of Virginia for embezzlement of funds in the bank.

> "There might well be different conclusions reached in the two courts. A jury in the criminal case might properly enough conclude that, however foolish and unjustifiable the defendant's conduct may have been, he was not guilty of intentional wrong. The court in the equity case might rule that the defendant's disregard of the ordinary rules of common sense and management was so flagrant as to create a civil liability to those thereby injured without viewing him as a criminal worthy of imprisonment."

The court further said, in reference to enjoining the attorney of the Commonwealth of Virginia from prosecuting the indictment for embezzlement, that no case could be found where an injunction against a State officer had been upheld where it was conceded that such officer was proceeding under a valid State statute.

We submit that the reasoning of Mr. Justice Shiras, in delivering the opinion in the case of Harkrader *v.* Wadley, entirely justifies our position in the case at bar. The sole question in the Circuit Court of the United States, where the bill in equity was filed, and in the State court, where the warrant against Wood was issued, was the validity of the passenger-rate statute. If that statute was valid, it would result in a dismissal of the bill in equity. On the contrary, if the complainant, the Southern Railway Company, was right in its contention in the case in the Circuit Court of the United States, that the passenger-rate act was invalid, the indictment in the State court must necessarily fall. There was absolutely no difference between the issues in the two cases.

And we submit that such is declared to be the opinion of this court by what it said through the same justice in Prout *v.* Starr, 188 U. S., 537. That was one of the cases, it will be remembered, dealt with in Smyth *v.* Ames. The Attorney General of Nebraska, pending the suit in the United States Circuit Court, had brought an action against one of the complainant railroads for penalties. The further

prosecution of this action was enjoined. At the conclusion of its opinion this court said:

> "Several changes of incumbents in the office of Attorney General took place while the cases were proceeded in, but that did not deprive the court of jurisdiction. The successors in office were duly substituted and thus became subjected to the preliminary and final decrees of the court. The object of the supplemental bill was to restrain the present appellant, as successor to Smyth, from attempting to transfer the very matters which stood for judgment in the Federal court to the State court by filing a bill in the latter. Such a course might bring about a conflict between those courts and create the confusion so often deprecated by this court (Peck *v.* Jenness, 7 How., 612, 625; Chittenden *v.* Brewster, 2 Wall., 191; Orton *v.* Smith, 18 How., 263).
>
> "The jurisdiction of the circuit court could not be defeated or impaired by the institution by one of the parties of subsequent proceedings, whether civil or criminal, involving the same legal questions in the state court (Harkrader *v.* Wadley, 172 U. S., 148, 166)."

If the contention of the State of North Carolina is sound, that notwithstanding the assumption by the Circuit Court of the United States of jurisdiction over this controversy, and the exercise of its judicial power in issuing the interlocutory injunction, the State of North Carolina can assert in her criminal courts that the Passenger act is a valid law and those violating it subject to indictment and conviction, then exactly the same state of case will exist after a final decree should one be rendered in favor of the Complainant and after its affirmance by this Court, should it be here affirmed.

It is true that what would be said here in an opinion affirming would be a precedent. But if the contention of North Carolina is sound, it would be nothing more than a precedent.

In every indictment found there would have to be a trial and the facts shown. In every penal action brought, there would have to be the same defense. The court would no doubt tell the jury that the principles of law laid down by this court should bind them, but it would be for the jury to apply the law to the facts in each case.

In the Smyth case this court was careful to leave the case open, so that if conditions changed, there might be a revision of the decree. But all this, under the contention of the North Carolina authorities, was quite useless. If conditions changed, the carrier could be indicted, and, the facts proved at the trial not being the same, its conviction could easily follow.

To restate the matter, the contention of the State that, although the Fourteenth Amendment to the Constitution of the United States prohibits a State from depriving, in any manner, a person of his property without due process of law, it can do so through the medium of its criminal laws, and that no court of the United States can issue an injunction to prevent it, thus logically and inevitably raises the further question, whether, if the injunction granted by the Circuit Court of the United States is affirmed by the Supreme Court of the United States, the State will still have the power to deprive the complainant of the benefit of that injunction, and to still continue to harass and punish it under the terms of these criminal statutes.

THE NEXT QUESTION IS, CAN A CARRIER BE PROTECTED BY A DECREE IN A COURT OF EQUITY FROM CRIMINAL AS WELL AS CIVIL HARASSMENT UNDER A VOID STATUTE?

In Davis & Farnum Mfg. Co. *v.* Los Angeles, 189 U. S., 207, 218, this court said:

> "It would seem that, if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitu-

> tional law, that jurisdiction would not be ousted by the fact that the State had chosen to assert its power to enforce such law by indictment or other criminal proceeding."

Again, in Dobbins *v.* Los Angeles, 195 U. S., 223, 241, this court said:

> "It is well settled that where property rights will be destroyed unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity (Davis & Farnum Mfg. Co. *v.* Los Angeles, 189 U. S., 207, 218, and cases therein cited)."

In the case of Reagan *v.* Farmers' Loan and Trust Co., the injunction prohibited John H. Reagan and others, acting as the Railroad Commission of Texas, and Charles A. Culberson, acting as the Attorney General of the State of Texas, and his successors in office, from instituting, or authorizing, or directing any suit or suits, action or actions, against the defendant railroad company for the recovery of any penalties under and by virtue of the provisions of the act of the Legislature of the State of Texas approved April 3, 1891.

Section 14 of that act made any railroad company and its agent and officer violating the provisions of the act guilty of extortion, and provided that they should forfeit and pay to the State of Texas a sum of not less than one hundred nor more than five thousand dollars. Sections 15 and 16 created similar offenses against the State. The defendants in that case, including the Attorney General, were enjoined from enforcing these penalties.

The final decree in Smyth *v.* Ames, which was affirmed by the Supreme Court, is given in the report of that case (169 U. S., 476). We make an extract therefrom, observing that the words in italics were by the court directed to be struck out. This shows that this court approved the decree

prohibiting criminal proceedings or proceedings by way of indictment, as well as civil proceedings or proceedings by way of civil action.

> "And that the Board of Transportation of said State and the members and secretaries of said board be in like manner perpetually enjoined and restrained from entertaining, hearing or determining any complaint to it against said railway companies or any or either of them *or their receivers*, for or on account of any act or thing by either of said companies or their receivers, their officers, agents, servants or employees, done, suffered or omitted, which may be forbidden or commanded by said alleged act, and from instituting or prosecuting or causing to be instituted or prosecuted any action or proceeding, civil or criminal, against either of said companies or their receivers for any act or thing done, suffered or omitted, which may be forbidden or commanded by said act, *and particularly from reducing its present rates of charges for transportation of freight to those prescribed in said act*, and that the Attorney General of this State be in like manner enjoined from bringing, aiding in bringing, or causing to be brought, any proceeding by way of injunction, mandamus, civil action or indictment against said companies or either of them or their receivers for or on account of any action or omission on their part commanded or forbidden by the said act."

To the general principle that a court of equity will not entertain a bill to restrain criminal prosecutions as such, recognized exceptions have been made. A familiar one, which seems to be as old as the rule itself, is that recognized in the case of *In re* Sawyer, 124 U. S., 200, where Justice Gray said for the court, at page 211:

> "The modern decisions in England by many equity judges concur in holding that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there (Attorney General *v.* Cleaver, 18 Ves.,

> 211, 220; Turner *v.* Turner, 15 Jurist, 218; Saull *v.* Browne, L. R., 10 Ch., 64; Kerr *v.* Preston, 6 Ch. D., 463)."

The exception referred to by the court is a conspicuous one. But sometimes courts in stating exceptions to a rule use general language, which, if taken literally, would exclude other exceptions less frequently occurring.

In Turner *v.* Turner, referred to, suit had been instituted for the administration of the estate of William Turner, and an injunction had been issued restraining the defendant, W. S. Merywether, and Mary Ann, his wife, from carrying on an action of ejectment for recovery of any part of the lands and hereditaments of the decedent. Under an order of the court, a solicitor went with workmen to pull down the house. The solicitor entered the house by force, and had the workmen tear it down; whereupon Merywether preferred a bill of indictment against the solicitor and his agents for forcibly entering and expelling him from the house. Thereafter one of the parties to the case presented a petition for an injunction restraining Merywether from prosecuting the indictment. The court without hesitation issued an order restraining the respondent, Lord Cranforth, V. C., saying:

> "I shall certainly make an order restraining Mr. Merywether from prosecuting the indictment. The distinction is very intelligible: this court has no jurisdiction over an indictment in general, as over a mere civil proceeding, but this is merely with reference to its own jurisdiction. If the court makes an order to which all parties consent, or by which all parties must be considered as bound, and then any party chooses to obstruct the parties executing it, the court will certainly prevent him from proceeding against the officer of the court for doing that which he would have been punished by the court for not doing."

The foundation of this exception is the fact that the court has taken jurisdiction of the subject-matter, and will not

allow this jurisdiction to be obstructed by proceedings elsewhere, which would tend to interfere with or defeat such jurisdiction by harassing parties to the suit, or to obstruct the orders of the court.

In Mr. Justice Field's concurring opinion in the Sawyer case, *supra*, another exception is suggested. He says:

> "In many cases proceedings criminal in their character, taken by individuals or organized bodies of men, tending, if carried out, to despoil one of his property or other rights, may be enjoined by a court of equity."

In Springhead Spinning Company *v.* Riley, L. R., 6 Eq., 558, Vice-Chancellor Malins held that—

> "The jurisdiction of this court is to protect property, and it will interfere by injunction to stay any proceedings, whether connected with crime or not, which go to the immediate, or tend to the ultimate, destruction of property, or to make it less valuable or comfortable for use or occupation."

The exception referred to by Justice Field, namely, that a bill in equity is sustainable where it seeks to prevent irreparable injury to property rights of the petitioner or complainant, has also been recognized by many courts of the United States, both State and Federal. The function of courts of equity is primarily the protection of rights of property, and though a court of equity will not ordinarily interfere to prevent criminal proceedings, even though there be an incidental injury to pecuniary interests, yet it would seem upon principle that preventive relief should be granted where the effect of the proceedings is primarily and essentially an injury to property, although such proceedings be instituted in the name of the State and be penal or criminal in character. The authorities sustain this principle.

In Schandler Bottling Co. *v.* Welch (C. C., Dist. Kan.), 42 Fed., 561, complainant applied for an injunction against

the county attorney of Shawnee county, Kansas, the sheriff of said county, and their officers and deputies, to restrain them from instituting or prosecuting civil or criminal actions against the complainant's agents for selling liquor in the original package shipped from other States, or otherwise attempting to enforce the Kansas prohibition law. The court declared that the general rule that courts of equity may not restrain criminal proceedings has its exceptions, and said:

> "One of these is where a threatened criminal proceeding is hostile, vexatious and unwarranted, and involves the wanton destruction of or injury to property interests of the accused; and especially so under circumstances where, if permitted to proceed, the party injured would have no adequate remedy at law for restitution."

Numerous cases are referred to in support of this principle, and the temporary writ of injunction was granted.

In Central Trust Company *v.* Citizens' Street Railroad Co. (C. C., D. Ind.), 80 Fed., 218, a motion for a preliminary injunction was made by complainant against the street railroad company and the prosecuting attorney for the district to restrain the respondents from attempting to enforce an act of Indiana requiring passengers to be carried by the railroad company at a certain fare, and requiring the company to issue transfers under certain circumstances, under pain of being ousted from the highways and being subjected to fines. The court issued the injunction as prayed, saying, per Showalter, C. J.:

> "Counsel urge that this bill does not show a cause of action cognizable in chancery against Mr. Wiltsie, the district attorney, since its purpose is to restrain him from instituting criminal prosecutions under color of the amendment of 1897. But this complainant is seeking to protect a *property right*, and it seems to be law that, when such prosecutions are

> threatened under color of an invalid statute for the purpose of compelling the relinquishment of a *property right*, the remedy in chancery is available." Citing the Reagan case, 154 U. S.

So, in Los Angeles City Water Co. *v.* City of Los Angeles (C. C., S. D. Cal.), 103 Fed., 711, the complainant filed a bill in equity to annul an ordinance of the city establishing rates the complainant might charge for water, in which cause the complainant afterwards filed a supplemental bill making certain consumers of water parties, seeking an injunction against the city and the consumers from enforcing the ordinance. Under the ordinance and the statutes and Constitution of the State, suits might be brought to forfeit the water works to the city, and criminal suits were also provided for. The court granted the injunction, saying, at page 738:

> "If the ordinance be void, and the defendant city, notwithstanding, threatens to, and, unless restrained by the court, will proceed to enforce its penal provisions, including those contained in it and in the Constitution and statutes of California, for the forfeiture to the city of the water works in question should the complainant charge other rates than those therein prescribed, and otherwise dispossess the complainant of the property, nothing can be plainer than that a court of equity ought to restrain the city, and its power to do so is quite clear. * * * And if, as is alleged, certain of the water consumers, acting under such statutory provisions and under the same provisions of the ordinance in question, threaten to, and will, unless restrained, commence similar suits for the forfeiture of the works to the city, and *criminal suits* against the complainant and those acting for it, as provided in the ordinance, ought not a court of equity to restrain them also? Undoubtedly so."

In Southern Express Co. *v.* Mayor, etc., of Ensley (C. C., N. D. Ala.), 116 Fed., 756, a bill was brought by the complainant to enjoin the enforcement of an ordinance exacting

a license fee, the violation of which was punishable criminally, against the city and the municipal authorities. The defendants contended that the court had no power to enjoin criminal proceedings, but Judge Jones issued the injunction, saying, at page 760:

> "The reason of the rule forbidding a court of equity to stay criminal proceedings can never apply in any degree to any prosecution in the criminal courts, unless the crime or offense for which the offender is prosecuted is created by some valid law or ordinance, or by laws or ordinances whose invalidity is doubtful and has not been pronounced by the courts of final resort." * * *

Again, on page 762:

> "It is settled that a court of equity should enjoin the enforcement of a municipal ordinance, though violations of it are punished criminally, when its enforcement will effect the illegal destruction of, or a grave interference with, a *corporate franchise*, in the operation of which the public have an interest."

Bills to enjoin criminal prosecutions where property rights or the integrity of corporate franchises were threatened by such prosecutions have been sustained by the courts in a number of States; for example, in Georgia, Alabama, Colorado, New York, Maryland, Indiana, Texas, and Kentucky. We shall now refer to some of these decisions.

In Gould & Company *v.* Mayor and Town Council of the City of Atlanta, 55 Ga., 678, the complainant company sought an injunction against the municipal authorities from enforcing an ordinance, by criminal prosecution or otherwise, requiring the payment of license fees to be made within an hour after they accrued, under pain of certain penalties. The court granted the injunction. This case was followed in the case of City of Atlanta *v.* Gate City Gas Light Company, 71 Ga., 106, where the gas company prayed for an injunction against the city, its mayor, and its engineer,

restraining them from interfering, by arrest or otherwise, with the complainant in laying down its pipes, under an ordinance of the city giving the authorities power to arrest and punish any one obstructing or interfering with the streets. The company claimed that it had the right under its charter to lay its pipes in the streets. The court issued the injunction, saying, at page 126:

> "That injunction was the proper remedy to restrain the defendants from interfering with and hindering the prosecution of the complainant's work under its charter is evident, both upon principle and authority. While a court of equity will not interfere by injunction with the prosecution of a criminal proceeding, yet, where it is evident that *private property and civil rights* are invaded by such means, equity will interfere to protect them. 'If the charge be of a criminal nature, or offense against the public, and does not touch the enjoyment of property, then a court of equity should not interpose by injunction.' On the other hand, where it is manifest, as in this case, that a prosecution and arrest is threatened for an alleged violation of city ordinances for the sole purpose of preventing the exercise of civil rights conferred directly by law, injunction is a proper remedy to prevent injury to the party thus menaced (33 Ga. R., 601)."

In Georgia Railroad & Banking Co. *v.* City of Atlanta, 118 Ga., 486, the railroad company sought an injunction against the city to prevent it from interfering with its erection of a fence on what it claimed to be its right of way, and from prosecuting it for obstructing the streets by such fence. The lower court refused to grant the injunction, but the Supreme Court reversed the decision, saying:

> "The city insists, however, that the refusal to grant the injunction was proper, since equity will not interfere with the enforcement of criminal laws, nor aid or obstruct criminal courts in the exercise of their jurisdiction. * * * But that principle in no way

> deprives a court of equity of its power to protect *private property*, nor ousts chancery of its jurisdiction over nuisances and trespasses, nor prevents the grant of injunctions against threatened or existing wrongs, nor defeats its power to enjoin a continuing injury to property or business."

The court rested its decision on the ruling in the City of Atlanta case, 71 Ga., 126, already cited.

In Port of Mobile *v.* Louisville & Nashville R. Co., 84 Ala., 115, the Railroad Company filed a bill against the city to enjoin the enforcement of an ordinance making it unlawful for any person to load or unload cars in the streets, under penalty. The injunction was granted, and the judgment of the court granting the injunction was affirmed by the Supreme Court of Alabama, which declared:

> "The mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of *property rights*, and the party aggrieved has no other adequate remedy for the prevention of the irreparable injury which will result from the failure or inability of a court of law to redress such rights."

In Platte, etc., Milling Co. *v.* Lee, Mayor, *et al.*, 2 Col. App., 184, the city was enjoined from prosecuting the owner of a ditch for violating an ordinance requiring the ditch to be confined and reconstructed by boxing or otherwise, so as to prevent the washing away of the property along the ditch. The court declared that while courts of equity will not ordinarily issue injunctions against the prosecution of criminal cases, yet they will do so where such prosecution tends to impair vested rights and inflict irreparable injury.

In Austin *v.* Austin Cemetery Association, 87 Tex., 330, an injunction was granted against the city from criminally prosecuting the cemetery corporation for failure to observe an ordinance making it unlawful to bury bodies except in

certain places. The court in granting the injunction used the following language:

> "No one, we apprehend, without some considerable inducement, will do an act which will cause him to be arrested and prosecuted, however clear he might be in his own mind that the act constituted no violation of the criminal law. A criminal prosecution is unpleasant to all people who have due respect for the law, and almost necessarily involves inconvenience and expense. As long as the ordinance remains undisturbed it acts *in terrorem*, and practically accomplishes a prohibition against the burial of the dead within the limits of the city of Austin, save in the excepted localities. * * * But to deny a remedy in a court of equity in the case first supposed, or in the present case analogous to it, would be, we think, to disregard the fundamental principle upon which such courts are established."

The *rationale* of the decision was that the injunction was proper in order to prevent the deprivation of vested property rights.

Arrests and criminal prosecutions have been enjoined in New York in several cases. Thus in Manhattan Iron Works *v.* French, 12 Abb. (N. C.), 446, an injunction was issued against the board of police commissioners of New York, the superintendent of police, and the captain of police to prevent the arrest of the complainant or its servants, in order to stop the manufacturer's Sunday work, under a provision of the New York Penal Code. The court pointed out that if the complainant were to submit to the arrest of its servants, make defense before the magistrate, and, if convicted, sue out a writ of *habeas corpus*, its business interests would nevertheless be ruined.

In Wood *v.* City of Brooklyn, 14 Barb., 425, an injunction was granted against the city, its mayor, and its chief of police, to restrain them from enforcing the Sunday ordinance by arrest of complainant, on the ground that the

enforcement of the ordinance would break up the complainant's business.

Penalty suits brought by the authorities of the city of Baltimore were enjoined in Mayor and City Council of Baltimore *v.* Radecke, 49 Md., 217.

In Shinkle *v.* City of Covington, 83 Ky., 420, the judgment of the lower court refusing to enjoin criminal action on the part of the city was reversed by the appellate court. A city ordinance made it a misdemeanor for any one to permit his boats to remain at a certain place on the river bank. The court declared that appellant would be compelled to abandon the possession of his landing place in order to avoid the penalties of the ordinance.

The same principles are laid down in Rushville *v.* Rushville Natural Gas Company, 132 Ind., 575, and in Flaherty *v.* Fleming, 58 W. Va., 669. In the latter case, Cox, J., said:

> "It appears, however, that if a statute, concerning which an arrest or criminal prosecution is threatened, affects civil property and its enjoyment, in protecting the property right equity may properly enjoin the criminal prosecution; but in such case its interference is founded solely upon the ground of injury to property and the necessity of preserving property rights."

But, as stated above, the Supreme Court of the United States has set the question at rest in Davis & Farnum Manufacturing Company *v.* Los Angeles, 189 U. S., 207, and Dobbins *v.* Los Angeles, 195 U. S., 223. A discussion of many of the cases on this subject will be found in 129 Fed., at page 421, in Camden Interstate Railway Company *v.* City of Catlettsburg (April, 1904).

It would seem clear that in a case where an injunction is necessary, both to protect property rights and to maintain the integrity of the jurisdiction and authority of a court which has already assumed control of the subject-matter,

there should be no hesitation on the part of the court in granting an injunction to restrain criminal prosecutions.

LET US, HOWEVER, ASSUME, FOR THE SAKE OF ARGUMENT, THAT THE CIRCUIT COURT OF THE UNITED STATES HAD NO JURISDICTION OF THE BILL OF COMPLAINT OF THE SOUTHERN RAILWAY COMPANY, AND THEREFORE THE ORDER OF INJUNCTION WAS VOID.

This assumption can only be predicated upon the idea that the passenger-rate act was an enactment entirely independent of all others; that it went into effect on July 1, 1907; that prior thereto there was no one against whom the Southern Railway Company could bring a suit in order to determine its validity, and that its penalties began to accrue on the date named. In other words, let us assume that upon failure of the Southern Railway Company to reduce its passenger rate from 3¼ cents, first class, and 2¾ cents, second class, as fixed by the North Carolina Corporation Commission, to 2¼ cents, both classes, on July 1, 1907, it became at once liable thereafter to a penalty of $500 for every ticket which it should sell, and that each of its agents selling a ticket would be guilty of a misdemeanor, to be punished by a fine and imprisonment, in the discretion of the court.

Based upon these assumptions, would the passenger-rate law of North Carolina be constitutional? Of course, if such an act is finally decisive of the question of the reasonableness of the rate, no other question can be presented. But we must assume that this is not true; we must assume that the law is, as has been frequently declared by this court, that the carrier is entitled to a judicial review upon the question whether the rate fixed by the legislature is such as can, under the Fourteenth Amendment, be imposed upon the carrier. It is to be observed that the record shows that the Southern Railway Company sells about 5,000 of these tickets every day. The record does not disclose how many station agents

and conductors or other persons engaged in exacting passenger fares are employed by the company, but as the company has some 1,400 miles of railroad in North Carolina, it may fairly be assumed that there are at least 500 of such persons. This would be a very low estimate. We would therefore, on the case stated above, have the railroad itself subjected to penalties amounting to $2,500,000 per day, and 500 of its agents amenable to indictment for misdemeanor and subject to fine or imprisonment, or both, at the discretion of the court. It will be noticed that in the case at bar the agent was condemned to work on the road 30 days. This means he was to be put in stripes and in a chain gang, and made to suffer all the humiliation that this implies.

Let us assume, for the sake of argument, that it would be competent for the company, when sued by a passenger for a penalty, or for the agent when indicted, to show by evidence that the act was unconstitutional because the rate fixed was such as to deprive the Southern Railway Company of its property without due process of law. What should be the conduct of the Southern Railway Company in order to get this question raised? It is too obvious for comment that it could not afford to disregard the act. In the first place, the risk of these penalties is such that if it should turn out that the rate is not confiscatory the accumulation would in the course of a few days render the company absolutely bankrupt.

Again, the expense of the separate trials would be enormous and the procuring of the attendance of witnesses impossible. In the Tompkins case this court sent the case back in order that it might go before a thoroughly competent master before the Circuit Court should consider the questions.

But, aside from any question of pecuniary loss, it is perfectly obvious that the Southern Railway Company could not afford to allow its agents to subject themselves to the risk of being tried, convicted, and punished as felons; and if the Southern Railway Company were to be willing to allow its

agents to incur such a risk, it is out of the question to suppose that they would do so, or that they could in any sort of reason be asked to do so.

There have been three cases brought to this court in which a railroad company has endeavored to defend in a suit for a penalty for failure to comply with a passenger-rate law, such suit being brought by a private individual. These are as follows:

Dow v. Beidelman, 125 U. S., 680. This case bears on its face evidence that it was an agreed case. However that may be, it seems to us clear that in deciding it the court was under the influence of the Granger cases and had not yet reached the conclusion that a rate fixed by legislative enactment could be challenged.

The next case is *C. & G. T. R. Co. v. Wellman*, 143 U. S., 339. It is evident in this case that the court regarded the suit as a friendly one.

The last case is that of *St. Louis & San Francisco R. Co. v. Gill*, 156 U. S., 649. This was a suit by a private individual, alleging that the railway company had on five distinct occasions charged and received from him more than the maximum tariff fixed for passengers by the Legislature of Arkansas. In the course of the opinion Mr. Justice Shiras calls attention to the case of *Chicago Railway Co. v. Minnesota*, 134 U. S., 418, saying (p. 659):

> "But it will be observed that the State was represented by the Commission, and that the remedy went to the validity of the legislation as affecting the railroad company's business as a whole. It was not a suit between the company and an individual customer. Mr. Justice Miller, in his concurring opinion, said: 'Until the judiciary has been appealed to to declare the regulation made, whether by the legislature or by the Commission, voidable for unreasonableness, the tariff of rates so fixed is the law of the land, and must be submitted to both by the carrier and the parties with whom he deals; that the proper, if not

> the only mode of judicial relief against the tariff of rates established by the legislature or by its commission is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of the court forbidding the corporation from exacting such fare as excessive, or establishing its rights to collect the rates as being within the limits of just compensation for the service rendered; that until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method; and that, in the present case, where an application is made to the Supreme Court of the State to compel the railroad companies to perform the services which their duty requires them to do for the general public, which is equivalent to establishing by judicial proceedings the reasonableness of the charges fixed by the Commission, I think the court has the same right and duty to inquire into the reasonableness of the tariff of rates established by the Commission before granting such relief that it would have if called upon so to do by a bill in chancery.'"

He next calls attention to the case of *Chicago Railway Co. v. Wellman*, 143 U. S., 339, and in reference to that case says (p. 660):

> "But the observations of this court by Mr. Justice Brewer are very pertinent to the present case. After stating the facts of the case, he said: 'Can it be, under these circumstances, that the court erred in peremptorily refusing to instruct the jury that an act fixing a maximum rate at 2 cents per mile is unconstitutional? Is the validity of a law of this nature dependent upon the opinion of two witnesses, however well qualified to testify? Must court and jury accept their opinion as a finality? Must it be declared, as a matter of law, that a reduction of rates necessarily diminishes income? May it not be possible—indeed, does not all experience suggest the probability—that

a reduction of rates will increase the amount of business, and therefore the earnings?' And referring to the following observation made by the Supreme Court of Michigan in passing upon the case: 'In the stipulation of facts or in the taking of testimony in the court below neither the Attorney General nor any other person interested for or employed in behalf of the people of the State took any part. What difference there might have been in the record had the people been represented in the court below, however, in our view of the case, is not of material inquiry.' Mr. Justice Brewer added: 'We think there is much in the suggestion. The theory upon which, apparently, this suit was brought is that parties have an appeal from the legislature to the courts; and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature so to enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between parties. It was never thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act. * * * Our suggestion is only to indicate how easily courts may be misled into doing grievous wrong to the public, and how careful they should be not to declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts.'"

Again the court says (p. 666):

"Sometimes in acting on this subject the State legislatures have created commissions or boards of public

works, with power to establish rates for the transportation of passengers and freight, and in such instances the course recommended by Mr. Justice Miller, already cited, may well be followed; that the remedy for a tariff alleged to be unreasonable should be sought in a bill in equity or some equivalent proceeding, wherein the rights of the public as well as those of the company complaining can be protected. But there are other cases, and the present is one, where the legislatures choose to act directly on the subject by themselves establishing a tariff of rates and prescribing penalties. In such cases there is no opportunity to resort to a compendious remedy, such as a proceeding in equity, because there is no public functionary or commission which can be made to respond, and therefore, if the companies are to have any relief, it must be found in a right to raise the question of the reasonableness of the statutory rates by way of defense to an action for the collection of the penalties. However, we have seen that in the present case the evidence failed, in that it was restricted to a part only of the railroad, and that even if the evidence could be understood as applicable to the entire line in Arkansas, there was no finding of the facts necessary to justify the courts in overthrowing the statutory rates as unreasonable, but that, on the contrary, the company's case depended on allegations admitted by the demurrer of a party who, in no adequate sense, represented the public; and, upon the whole, we do not feel warranted, by all that appears in this record, in declaring invalid an act of the legislature of Arkansas, which, on its face, appears to be a legitimate exercise of power, and which has not been shown by clear and satisfactory evidence, to operate unjustly and unreasonably, in a constitutional sense, against the plaintiff in error. The judgment of the Supreme Court of Arkansas is accordingly affirmed."

Especial attention should be called to this sentence: "The company's case depended on allegations admitted by the demurrer of a party who, in no adequate sense, represented the public." It would possibly be going too far to say that

this court has held that a rate fixed by the legislature cannot be challenged as confiscatory in a suit brought by a private individual for a penalty incurred by a violation of the act. We know of no case in which such defense has been attempted to be made to an indictment. It is, however, obvious that the difficulty encountered in making such a defense either to a penal action or to an indictment is so great as not to constitute due process of law. Indeed, we may say that if it is the law that a State may pass an act fixing a passenger or freight rate and prescribing penalties to be enforced, civilly and criminally, for its violation, and there is no other means of judicial review, the carrier is without remedy.

We are, then, back again to the doctrine laid down by Justice Field in the Cummings case, and Chief Justice Taney in the Bronson case, and Mr. Justice Bradley in the Virginia Coupon case, that what cannot be done by direction cannot be done by indirection, and that to take away a remedy is the same exactly as to take away a right, and that a citizen cannot in any way be hastened, injured or destroyed by unconstitutional laws without having some legal means of intervenor or redress.

At least four circuit courts have decided that these penal provisions are in and of themselves void without regard to whether the rates fixed are reasonable or unreasonable. These are:

Mercantile Trust Co. v. Texas & Pac. Ry. Co., 51 F. R., 529;

Louisville & Nashville R. Co. v. McChord, 103 F. R., 216;

Consolidated Gas. Co. v. Mayor, 106 F. R., 330;

Ex parte Wood, 155 F. R., 180;

the last case being the case at bar.

In other cases it has been held that the existence of these penalties is in itself a ground of equitable jurisdiction, the remedy at law in the defense of the action for the penalties being obviously inadequate.

Thus in *Smyth v. Ames,* Mr. Justice Harlan says (p. 517):

> "In these cases the plaintiff stockholders in the corporations named ask a decree enjoining the enforcement of certain rates for transportation upon the ground that the statute prescribing them is repugnant to the Constitution of the United States. Under the principles which in the Federal system distinguished cases in law from those in equity, the Circuit Court of the United States, sitting in equity, can make a comprehensive decree covering the whole ground of controversy, and thus avoid the multiplicity of suits that would inevitably arise under the statute. The carrier is made liable not only to individual persons for every act, matter or thing prohibited by the statute, and for every omission to do any act, matter or thing required to be done, but to a fine of from $1,000 to $5,000 for the first offense, from $5,000 to $10,000 for the second offense, from $10,000 to $20,000 for the third offense, and $25,000 for every subsequent offense. The transactions along the line of any one of these railroads, out of which causes of action might arise under the statute, are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree, according to the prayer of the bills, would avoid a multiplicity of suits, and give a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law; for a court of law could only deal with each separate transaction involving the rates to be charged for transportation. The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency, and determine, once and for all and without a multiplicity of suits, matters that affect, not simply individuals, but the interest of the entire community as involved in the use of a public highway and in the administration of the affairs of the quasi public corporation by which such highway is maintained."

In Bank of Kentucky *v.* Stone, 88 F. R., 383, the opinion of the court was delivered by Circuit Judge Taft, Harlan, Circuit Justice, and Lurton, Circuit Judge, sitting with him. The suit was one where the complainant, Bank of Kentucky, filed a bill in equity against the State Board of Valuation and Assessment of the State of Kentucky, to enjoin that Board from assessing the property of the bank under the Kentucky Act of 1892, upon the ground that that act impaired the obligation of a contract theretofore entered into between the bank and the State of Kentucky. It was objected that equity had no jurisdiction. After considering other matters, the court said (p. 390):

> "But the collecting officers are not obliged to collect the taxes by distraint; they may resort to a simple suit at law for them. In that case the bank may defend on the ground of the invalidity of the law under which the taxes have been assessed. This remedy, except where the taxes are a cloud upon real estate, would ordinarily be adequate; but, under the provisions of the revenue law of November, 1892, we do not think it is. By that law, the bank, on failing to pay the taxes assessed, according to its provisions, within thirty days after notice from the collecting officer, is subjected to a penalty of 10 per cent., and to a fine of $50 a day for every day of the delinquency, to be enforced by indictment or by civil action. It follows that the remedy of defending a suit at law for taxes under this revenue act is attended with the risk of being compelled to pay $50 a day for every day of the time necessarily consumed in the reasonable litigation of the question of the validity of the tax. By bill in equity the bank may enjoin the assessment, and pending the litigation, however long the delay, no fines or penalties can accrue against the unsuccessful litigant, because, by the terms of the act, they do not begin to accrue until 30 days after notice to pay has been given by the collecting officer. It is manifest that the remedy at law by defending a tax suit in such cases is attended with a great and oppressive burden of risk, which is absent in an action in equity. The remedy at law is there-

> fore entirely inadequate (Smyth *v.* Ames, 169 U. S., 466, 518; 18 Sup. Ct., 418; Express Co. *v.* Seibert, 44 Fed., 315."

It is to be noticed that this opinion was delivered upon the application for a temporary injunction.

In Pacific Express Company *v.* Seibert, 44 F. R., 310, a bill was filed for an injunction against the enforcement of a statute of the State of Missouri requiring a certain return from express companies and the payment of a certain tax. It was alleged that the act was unconstitutional because it laid a tax on interstate commerce and made an illegal discrimination among express companies, thus denying to the plaintiff the equal protection of the law. The bill prayed that the act of the legislature might be decreed to be unconstitutional and the defendants enjoined from enforcing the act or attempting to collect any tax or penalty therein provided for. A temporary injunction was granted on filing the bill. The case came before the court on demurrer to the bill. One of the questions raised was that the bill stated no ground of equitable relief. After pointing out that a very clear case must be made out before a Federal court would enjoin the collection of a State tax, and that if the plaintiff could pay the tax and recover the money in case the act was invalid, there could be no relief by injunction, the court said (p. 315):

> "We have not been cited to any statute or decision of the Supreme Court of the State showing that if the plaintiff paid the tax a suit would lie against the State or her officer to recover it back. In the view taken by the court of the other points in the case, the decision of this question, one way or the other, would not change the result, and the court will therefore assume, for the purposes of this case, that by the laws of Missouri an action could not be maintained to recover back a tax like this. The act we are now considering does not contemplate a suit to collect the tax. The amount of the tax cannot be known until the company makes a return of its earnings; and the

making of this return and the payment of the tax are by the provisions of the act enforced by the imposition of a penalty of $100 per day, and the denial of the right to do business in the State so long as the company is delinquent. While it is true that the plaintiff might contest the validity of the act in any suit brought by the State to collect the penalty imposed for the non-payment of the tax, that would not be an adequate remedy, for the reason that during the pendency of such a suit the penalty of $100 would be accruing each day, and the plaintiff be denied the right to carry on its business in the State. It would take months, and possibly years, to reach a final decision of the case, and, if that decision should be favorable to the State, the penalty visited on the company would be very heavy indeed, including, as it would, the penalty of $100 per day for the whole period, and the destruction of its business in the State, and probably great injury to its business in other States. Equity abhors penalties, and holds the remedy at law inadequate when the assertion of the alleged right at law will be, or may be, attended by the imposition of heavy penalties and forfeitures. And upon this ground, and because an action will not lie under the laws of Missouri to recover back the tax if paid, equity has jurisdiction in this case."

An important and illustrative case is that of State *v.* Galveston, H. & S. A. Railway Co., Supreme Court of Texas (November 7, 1906), 97 S. W. Rep., 71.

This was a suit by the State against certain railroad companies to collect taxes prescribed by an act of the legislature of the State of Texas. It was provided in the act that upon failure to pay the taxes there should be imposed a penalty of two hundred dollars for each day. The railroads resisted the payment of these taxes upon the ground that the act directing their levy was unconstitutional. It was held, however, that the act was a valid one. The court, while rendering judgment for the taxes, refused to render judment for the penalties.

The court said (p. 78):

> "The trial court denied a recovery for the penalties, prescribed by the act for a failure to pay the taxes assessed, of which ruling the State complains. Article 1, sec. 13, of the Constitution of the State declares 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel nor unusual punishment inflicted.' The term 'fines' is synonymous with that of penalties, and the section of the Constitution applies to penalties prescribed by this act for the failure of the parties to pay the taxes. State *v.* Horgan, 55 Minn., 184; 56 N. W., 688. The declaration in the Constitution that 'fines' shall not be excessive makes it a question for the court to decide under all the facts of each particular case. In this case the penalties of $200 per day would in a year amount to $73,000. This penalty is inflicted for the detention of taxes assessed against the companies. The taxes claimed to be due from the Galveston, Harrisburg & San Antonio Railway Company would amount to $74,724 annually; so that the penalties for failure for one year to pay would be nearly 100 per cent. of that amount. The tax assessed against the Gulf, West Texas & Pacific Railway Company would amount to about $1,555 for one year, but the penalties for non-payment of this sum for a year would be $73,000, nearly 50 times as much as the amount of the tax. The assessment of a penalty of 100 per cent. for the failure to pay a tax would seem to be sufficiently excessive to authorize a court to declare it to be excessive, but the assessment of more than 4,000 per cent. upon the amount detained can leave no possible question that the penalties are out of all proportion to the amount of money detained, and the law must be held to be void for the penalties."

It is true that the invalidity of this statute on the subject of penalties was put upon the ground that the act in that respect violated the particular clause of the Constitution of Texas quoted in the opinion, but we submit that the act was

equally violative of the Fourteenth Amendment to the Constitution of the United States. In other words, if these penalties are so great as to be characterized as "excessive" fines and invalid because "excessive" the argument against their validity is even stronger when they are imposed with a view of preventing a carrier from insisting upon a right guaranteed to the carrier by the Constitution of the United States.

Besides this, there is the opinion of Mr. Justice Brewer in Cotting *v.* Goddard, 183 U. S., 92, which has been so often quoted and of which Mr. Justice Lacombe, in Consolidated Gas Co. *v.* Mayer, 146 F. R., 150, said:

> "In the case cited the judges who concur in the judgment appealed from * * * did so upon another ground, but the language of Mr. Justice Brewer, dictum though it be, commends itself as a clear and forceful exposition of the law."

This we regard as by far the most important question in this case. It is of little moment that this court shall have established it as a rule of law that a common carrier is entitled, with other citizens, to the protection of the Fourteenth Amendment; that neither Congress nor the legislature of a State can authoritatively and finally fix the amount which he is entitled to charge for the use of its property, and that on such a question it is entitled to a judicial review. If means were provided for such judicial review, but were so restricted that the carrier would be compelled to put in the rate pending an inquiry as to the validity of the act establishing the rate, it is obvious that for the time being, at least, the carrier would be deprived of its property without due process of law; for the time being, at least, its property would be taken from it without just compensation, and it would, for the time being, be denied the equal protection of the laws.

If we are correct that we had the right to pursue our remedy in equity, the court had undoubted power to grant

the interlocutory order. If we had no right to go into equity, then there were no means provided for adequate judicial review of any kind.

We submit that it is apparent from the above discussion that a State can no more violate a constitutional provision of the United States by indirection than it can do so directly.

That a State cannot directly deprive a carrier of the right of a judicial review of legislation claimed to deprive it of its property without due process of law is definitely settled by the case of Chicago, Milwaukee & St. Paul Ry. Co. *v.* Minnesota, 134 U. S., 458, where this court says:

> "If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

In this case a statute of Minnesota was held to be unconstitutional, because under the construction given to it by the highest court of that State it denied to the complainant company the right to a judicial review.

It is submitted, on reason and under the authorities above given, that the destructive penalties attached to the North Carolina rate legislation not only justify the interposition of a court of equity, but render the statute itself unconstitutional, because they result in an indirect, but on that account no less potential, denial to the complainant of a judicial review, except on terms of absolute destruction in the event the complainant's contention is not sustained.

Therefore at last there arises in this case the most important question whether it is incumbent upon a State

legislature, in prescribing freight or passenger rates, to provide some means by which their effect upon the income of the carrier can be ascertained, with the view of determining whether such rates will have the effect, if enforced, of depriving the carrier of its property without due process of law.

The question arises in this case whether the imposition of penalties upon the carrier and a fine and imprisonment upon its agents for failure to observe a rate fixed by the legislature, without any previous opportunity to ascertain whether the law imposing such rates is valid or invalid, is denying to the carrier the equal protection of the laws or depriving the carrier of its property without due process of law.

THE REMEDY OF HABEAS CORPUS WAS A PROPER ONE IN THIS CASE BY REASON OF ITS URGENCY.

This proposition, we submit, is correct, whether the Circuit Court had or had not jurisdiction.

It is true that this court, in the case of Fitts *v.* McGhee, 172 U. S., indicates that in the absence of exceptional or extraordinary circumstances a person held for trial in a State court should set up in that court any defense which he has under the Constitution and laws of the United States and pursue his remedy, if necessary, by writ of error, to the highest State court and then to the Supreme Court of the United States. But it is equally true that this court has sanctioned the use of the writ of *habeas corpus* and the immediate discharge of the prisoner where exceptional or extraordinary circumstances justify it.

Familiar examples are:

Minnesota *v.* Barber, 136 U. S., 313.
Boske *v.* Comingore, 177 U. S., 459.
In re Loney, 134 U. S., 372.
In re Neagle, 135 U. S., 1.
Ohio *v.* Thomas, 173 U. S., 276.

In the case of Boske *v.* Comingore, 177 U. S., 459, above cited, the petitioner for the writ was a United States collector of internal revenue. The court said:

> "As the petitioner was an officer in the revenue service of the United States, whose presence at his post of duty was important to the public interest, and whose detention in prison by the State authorities might have interfered with the regular and orderly course of the business of the department to which he belonged, it was proper for the District Court to consider questions raised by the writ of *habeas corpus* and to discharge the petitioner if held in violation of the Constitution and laws of the United States;"

Again:

> "The present case was one of urgency, in that the appellee was an officer in the revenue service of the United States, whose presence at his post of duty was important to the public interest and whose detention in prison by the State authorities might have interfered with the regular and orderly course of the business of the department to which he belonged. The District Court, therefore, did not err in determining the question of constitutional law raised by the application for a writ of *habeas corpus* and rendering final judgment."

Again, in the case of *Ohio v. Thomas,* 173 U. S., 276, above cited, it is said (p. 284):

> "One of the grounds for making such a case as this an exception to the general rule laid down in *Ex parte Royall,* 117 U. S., 241; *Whitten v. Tomlinson,* 160 U. S., 231, and *Baker v. Grice,* 169 U. S., 284, consists in the fact that the Federal officer proceeded against in the courts of the State may, upon conviction, be imprisoned as a means of enforcing the sentence of a fine, and thus the operations of the Federal government might in the meantime be obstructed. This is such a case. In *Ex parte Royall,* it was stated by Mr. Justice Harlan, in naming some of the exceptions to the general rule there laid down,

> that 'when the petitioner is in custody by State authority for an act done or omitted to be done in pursuance of a law of the United States or of an order, process or decree of a court or judge thereof; or where, being a subject or citizen of a foreign State, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission or order or sanction of any foreign State or under color thereof, the validity and effect whereof depend upon the law of nations; in such and like cases of urgency, involving the authority and operations of the General Government or the obligations of this country to or its relations with foreign nations, the courts of the United States have frequently interposed by writs of *habeas corpus* and discharged prisoners who were held in custody under State authority."

It would hardly seem necessary, after the full statement which has been made of the case at bar, to point out how exceptional and extraordinary are its circumstances.

What Wood did was done by him exactly in the manner prescribed by the order of the United States Circuit Court. His acts were strictly within the bounds of that order. If his arrest and trial by the State court could be justified, then the arrest and trial of every agent of the company in North Carolina could be likewise justified. It is too obvious for comment that such a proceeding would have entirely demoralized the service of the company.

While engaged in important matters of commerce within the boundaries of North Carolina the company was engaged in still larger matters of interstate commerce and was a carrier of United States mails. If its agents were to be arrested and held for trial for violation of the passenger act, it is quite apparent that all business of the company would soon have come to an end, not only its intrastate commerce, but its interstate commerce, and in a very brief time it must necessarily have ceased to carry United States mails or to perform

any other of the important public functions belonging to it. The fact being that a common carrier by reason of its employment is subjected to governmental regulation, by the same sign it must be true that it is entitled to governmental protection. The one is necessarily a correlative of the other.

As stated above, the remedy of *habeas corpus* should have been granted whether the Federal court had or had not jurisdiction. If the Federal court had jurisdiction, then the proceedings in the State court not only violated the order of the Federal court, not only inflicted punishment for an act done in pursuance of such order, but rendered absolutely vain and futile all the proceedings in that court.

If to the contrary the Federal court had no jurisdiction, this was because the State statute in fixing rates provided no means of judicial review and attempted to prevent any attempt at judicial review by the imposition of penalties so severe as to deter the carrier from any appeal to the courts.

In this state of case we submit the penalties are void as in and of themselves inimical to the Fourteenth Amendment. The urgency is exactly the same under either condition.

We respectfully submit that the judgment of the Circuit Court should be sustained on both grounds.

DECEMBER 17, 1907.

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APPENDIX.

EXHIBIT A.

OPINION OF COURT ON APPLICATION FOR DISCHARGE ON WRIT OF HABEAS CORPUS.

UNITED STATES OF AMERICA,
Western District of North Carolina:

IN THE CIRCUIT COURT.

IN RE

JAS. H. WOOD, PETITIONER.

This is an application of the petitioner, Jas. H. Wood, to be discharged on a writ of *habeas corpus* from the custody of the Sheriff of Buncombe County.

The petitioner was indicted on a charge of having violated the provisions of section four of an Act passed at the session of the legislature of North Carolina of 1907, prescribing the maximum charges railroad companies may make for transporting passengers in North Carolina, tried and convicted and sentenced to a term of thirty days' imprisonment to be worked upon the public roads of Buncombe County.

Some time since suits were instituted in the Circuit Court of the United States for the Eastern District of North Carolina by several railroad companies against the Corporation Commissioners of North Carolina, the Attorney General and the Assistant Attorney General of that State, for the purpose of obtaining protection of the Fourteenth Amendment to the Constitution of the United States against an Act of the legislature of North Carolina establishing maximum rates which such companies claimed to be confiscatory, and on a *prima facie* case, a motion was made before me for

interlocutory injunctions. Accordingly, on the 29th of June, I issued injunctions *pendente lite* enjoining the defendants and all other persons from putting the rates into effect during the inquiry before me as to the constitutionality of the same, and from instituting prosecutions or attempting to impose penalties upon the companies, or their employees, for a failure to put into effect the statutory rates which are being contested. The court amply preserved the rights of all the traveling public by requiring a coupon to be given to each purchaser evidencing the amount to be refunded to him in the event the rates should be upheld, and to secure the same ample bond and security were given. This was in accordance with the policy of the statutes of North Carolina where a rate made by the Commission is attacked. I thereupon referred the matter to a master to ascertain and report his conclusions to me, and, to avoid delay, required him in the order to make his report by the 25th of September, and fixed the hearing for the first Monday in October, so as to give the parties opportunity to have the questions involved finally determined by the Supreme Court at the earliest possible moment.

There was nothing unusual in the proceedings which were instituted before me by several railroad companies in the State. Similar suits have been instituted in the State of Alabama, where Judge Jones issued an injunction, and also in the State of Georgia, where Judge Newman pursued the same course.

Notwithstanding the United States Circuit Court had thus taken jurisdiction of the whole matter and was proceeding in an orderly way with its consideration, the evidence shows that the Governor of North Carolina has issued an address to the judges of the Superior Courts of the State, questioning the authority of the court to make the order referred to, and asking them to see that indictments against the agents and employees of the railroads and their officials be sent before the grand jury in order that the State may undertake the prosecutions which are enjoined in my order, and stating that, as chief executive of the state, he stands ready to aid them in enforcing the law. In accordance with this policy, a number of indictments have been found and prosecutions begun in defiance of the order of injunction issued by the United States Circuit Court. If these prosecutions are permitted and continued, the result will be to nullify the in-

junction which was granted by the Circuit Court, and to practically defeat its jurisdiction. Not only are the rights of litigants involved, but the dignity and authority of the Circuit Court of the United States as well. These prosecutions and arrests taking place in widely separated portions of the State, presents serious difficulties in the matter, and this court is confronted with open and avowed opposition by the powers of the State. Obstacles are being thrown in the way of inquiry by this court on writs of *habeas corpus* into the legality of arrests, and this seems to be the deliberate policy of those representing the State. I do not wish to be understood as imputing improper motives to the Governor or other State officials as respects their action in this matter. The penalties prescribed by the State statute for charging more than the statutory rates are so enormous, that if permitted to be enforced they would practically bankrupt the railroad in an exceedingly brief time and before a final hearing could be had in the cause, and thus place the complainant in a position where it would be powerless to assert the right which is guaranteed to it by the Constitution of the United States.

If the criminal prosecutions against the agents, conductors, and employees are permitted to continue, the managers of the railroads cannot successfully operate their trains, carry the mails, or continue their usefulness in interstate commerce.

The Constitution of North Carolina contains ample provision for the protection and preservation of the liberty of the citizen.

Article 1, Sec. 18, contains the following:

"Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed."

Section 21 of the same Article also provides:

"The privileges of the writ of *habeas corpus* shall not be suspended."

Section 1821 of the Revisal of North Carolina is as follows:

"Every person imprisoned or restrained of his liberty within this State, for any criminal or supposed criminal matter or on any pretense whatsoever, except in cases specified in the succeeding section, may prosecute a writ of *habeas*

corpus according to the provisions of this chapter, to inquire into the cause of such imprisonment or restraint, and if illegal, to be delivered therefrom."

Section 1828 of the same chapter is the only law of which I have any knowledge which imposes upon a judge a penalty for a failure to perform a judicial act. The section in question reads as follows:

"If any judge authorized by this chapter to grant writs of *habeas corpus* shall refuse to grant such writ when legally applied for, every such judge shall forfeit to the party aggrieved two thousand and five hundred dollars."

Thus it will be seen that the State Constitution of North Carolina as well as the statutory law, affords ample protection to every person who is deprived of his liberty without due process of law, and such being the case, it is remarkable that anyone representing the State should be opposed to the granting of the writ of *habeas corpus*.

Likewise, the Constitution of the United States and the Revised Statutes afford every citizen of the Union when imprisoned contrary to law, protection to the fullest extent by the writ of *habeas corpus*.

Article 1, Sec. 9, Cl. 2, of the Constitution of the United States is as follows:

"The privileges of the writ of *habeas corpus* shall not be suspended unless in cases of rebellion or invasion, the public safety may require it."

Section 751 of the Revised Statutes of the United States contains the following provisions:

"The Supreme Court and the Circuit and District Courts shall have power to issue writs of *habeas corpus*."

"The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty." (Revised Statutes, Sec. 752.)

"The court, or justice, or judge to whom such application is made shall forthwith award a writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained." (Revised Statutes, Sec. 755.)

Notwithstanding the plain provisions and enactments contained in the Constitution and Revised Statutes of the United States as well as the State Constitution and the statutes of

the State, it is seriously contended that the agents of the complainant in this instance, when indicted for the violation af the statute (the enforcement of which has been restrained by this court), are not entitled to this remedy which is afforded to every other citizen of the State.

If this policy is to prevail in North Carolina, persons who invest their money in enterprises like that of the complainant will be deprived of the means of protecting their property rights and denied the benefits of the writ of *habeas corpus* which is intended for the preservation of the liberty of every citizen.

It will be a sad day for the people of North Carolina when its citizens are prohibited by the acts of the legislature from asserting any right guaranteed to them by the Constitution of the United States. Suits of this character have been brought in different states of the Union, and in every instance the Federal courts have proceeded to determine the questions involved without interference, hindrance or delay by the legislative or judicial authorities of such states.

The equal protection of the law is guaranteed to every citizen of the United States, and I shall employ all means within the power of the court to secure to all persons who invoke the jursidiction of this court such rights to the fullest extent of the law.

If the law is construed in a spirit of fairness and impartiality there can be no conflict of jurisdiction between the state courts and the Courts of the United States.

Much has been said in regard to the power of a court of equity to enjoin the prosecution of a criminal case. In the case of Dobbins *vs.* Los Angeles, 195 U. S. 241, Mr. Justice Day, who delivered the opinion of the court, in discussing this phase of the question, said:

"It is well settled that where property rights will be destroyed, unlawful interference by criminal proceedings, under a void law, or ordinance, may be reached and controlled by a decree of a court of equity. Davis and Farnum Mfg. Co. *vs.* Los Angeles, 189 U. S. 207-18, and cases there cited."

In this instance the Federal court has not been the aggressor, but has simply adopted the regular practice and procedure which has been approved by the Supreme Court of the United States in cases of a like nature, and while

the court is not inclined to do anything that will produce an unseemly conflict, nevertheless, it is encumbent upon it to protect the rights of the parties to this controversy and the dignity and authority of this court, and this cannot be accomplished without preserving to the fullest extent the jurisdiction of the court in determining the question which has been submitted to it for consideration.

If, in pursuing the usual and well defined practice and procedure in such cases with the sole view of maintaining the jurisdiction of this court at any stage of the proceeding, conflict must come, and I trust that it may not, I shall not evade the responsibility which is imposed upon me as the presiding officer of this court.

Much has been said about the sovereignty of the State. That question does not arise in this controversy. This court having assumed jurisdiction of the subject matter involved in the original suit, wherein the railroad companies are complainants and the railroad commissioners and others are defendants, the real question is, as to whether this court shall be denied full and complete jurisdiction of the subject matter at issue in that suit.

If the contention of the counsel representing the State be true, then, this court can be deprived of its jurisdiction by the multiplication of criminal prosecutions in the State courts against the complainant, its agents and employees to such an extent as to finally place it in a position where it will be deprived of a larger amount than that which is involved in the original controversy, and thus, by indirection, the complainant will be denied a right which is guaranteed to it by the Constitution of the United States. This proposition is inconsistent with the well established rules of judicial procedure and does not commend itself to this or any court sitting as a court of equity. It excludes the idea of comity between the courts of concurrent jurisdiction.

Suppose complainant had instituted its suit in the State court instead of applying to this court, and that court had granted an injunction in pursuance of the laws of the State, could it be seriously contended that the State court, after having taken jurisdiction of the questions involved in the civil action, thus instituted, would permit the complainant to be subjected to criminal prosecutions and suits for the recovery of the enormous penalties enumerated in the statute of the State, during the pendency of the action, and before

there could be an ascertainment as to the rights of the parties to the original suit? The Supreme Court, under such circumstances, would undoubtedly preserve the rights of the parties until the final hearing, and any other course would be without precedent in the judicial history of the State. Notwithstanding this, we are confronted with an attempt on the part of those representing the State to do that, which, if successful, would render this court powerless to grant the same relief that would be granted as a matter of course in another court of concurrent jurisdiction.

The law provides that in all cases where the Federal courts have concurrent jurisdiction with the State courts, that such courts shall have power and authority to adjudicate any question that may come before such tribunals and to protect the rights of litigants to the same extent as that of the State courts.

The suits, out of which this controversy arose, were instituted in the same manner as other suits are instituted, and, involving as they do, the validity of a statute of North Carolina, it necessarily follows that all matters connected with the enforcement of such statute, during the pendency of that suit, are under the control and jurisdiction of the court wherein the questions involved are being litigated.

The court in the original suit having assumed jurisdiction of the questions at issue in that controversy and having entered a decree wherein, among other things, the complainant and its agents, were directed to employ certain means and do certain things in respect to the sale of tickets during the pendency of that suit, the court thereby assumed control of, and dominion over, the management of the business of the complainant in so far as intrastate transportation is concerned in the same manner as if the court had appointed a receiver of the property of complainant.

As a general rule, the Circuit Courts of the United States will not issue the writ of *habeas corpus* in cases where persons are indicted and imprisoned in pursuance of a statute of a State, and it must be remembered, that this is not an attempt on the part of the State to enforce a law which has for its object the preservation of the peace, protection of the morals, or the general welfare of the public, and it cannot be insisted that these prosecutions are necessary to promote the welfare of the public in view of the fact that this court has amply protected the rights of those who may purchase tickets by

requiring the complainant to give bond amply sufficient to secure the payment of any damages that may be sustained; but, on the other hand, is a penal statute, enacted with the sole view of enforcing obedience to the first section of the act which undertakes to fix maximum passenger rates. Therefore, inasmuch as the validity of the act which prescribes passenger rates is being contested, and the court has by injunction restrained the enforcement of the same, there is every reason why this court should exercise its discretion in granting writ of *habeas corpus*, when it is apparent that prosecutions of the complainant and its agents are being instituted solely for the purpose of deterring the complainant from prosecuting its original suit.

In view of this situation, the court is called upon to determine the question whether the petitioner is entitled to be discharged, inasmuch as it appears to the court that the act, on account of which he was indicted, was committed in pursuance of an order and decree of this court.

Section 753 of the Revised Statutes of the United States is as follows:

"The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, in its custody for an act done or omitted under any legal right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

The provisions of the foregoing section are so plain that there can be no doubt as to the true intent and meaning of the same. It is provided in express terms that the writ of *habeas corpus* shall extend to one who is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof.

In the case of State *v.* Boone, 132 N. C., 1108, Chief

Justice Clark, who delivered the opinion of the court, in discussing the Neagle case, among other things, said:

"No such doctrine is found in Neagle's case (Neagle's case 135 U. S. 1), for it only holds that what the Federal Government enjoins as a duty, the State cannot punish as a crime."

This court by proper order, having directed that the complainant should provide a ticket with a coupon attached thereto representing the difference between the present rate and the proposed rate, it thereby became the duty of the company and its agents to strictly comply with the requirements of such order, and any failure on their part to observe the same would render them liable to an attachment for contempt, and under such circumstances, the duty being enjoined by this court, the performance of the same by the complainant and its agents would not render them liable to punishment under the statute of the State. Any attempt to punish the company or its agents for the observance of the order and decree of this court, would be in utter disregard of the comity which should exist between the State and Federal courts, as well as an absolute nullity.

If the State courts possess the power to indict persons acting under the directions of the Federal court for the performance of a duty enjoined upon them in a suit which may be brought in such court, then the power of the Circuit Courts of the United States would be completely paralyzed and such courts would be rendered unable to proceed to the determination of any question involving the validity of the statute of a State legislature.

While the court is of the opinion that the petitioner is entitled to be discharged, for the reasons hereinbefore stated, nevertheless, there is another phase of this question which the court should consider, in order that there may be a proper determination of the matter in controversy, and in the consideration of which it is encumbent upon the court to pass upon the validity of Section four of the act in question, which reads as follows:

"That any railroad company violating any provision of this act shall be liable to a penalty of five hundred dollars for each violation, payable to the person aggrieved by such violation, and recoverable in an action to be instituted in the name of said person in any court of this State having

competent jurisdiction thereof. And any agent, servant, or employee of any railroad company violating this act shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court."

The foregoing section, among other things provides that the company or its agents shall pay a penalty of five hundred dollars for each failure to comply with the requirements of the act.

It has been held that no State can constitutionally close the doors of the courts to a judicial inquiry into the constitutionality of the rates it fixes.

In the case of Railroad Company *vs.* Minn., 134 U. S., 456, it was held by the Supreme Court of Minnesota that the act in fixing rates was conclusive and there could be no inquiry into such rates by judicial tribunals. Accepting this construction of the Minnesota act by the Supreme Court of that State, the Supreme Court of the United States declared the act unconstitutional, because it denied the railroad company a judicial investigation into the validity of the rates. If this cannot be accomplished directly it cannot be done indirectly.

It is well settled that what cannot be done by express enactment cannot be done by device or indirection. Therefore, any system of penalties which is intended to have the effect and which is so framed as to have the effect of closing the doors of the courts to a judicial inquiry as to rates, is in consequence of that fact unconstitutional and void. Section four of the act in question clearly attempts to do this. It imposes upon the company as a penalty for an unsuccessful attempt to appeal to the court, no matter how *bona fide* this bill is made, such enormous fines and penalties in favor of individuals as to burden the challenger of the act in the courts so as to make it, if the penalties were valid, practically impossible for such an appeal to be made.

In the case of Cotting *vs.* Kansas Stock Yards Co., 183 U. S., 100, Mr. Justice Brewer, who delivered the opinion of the court, in discussing this phase of the question, said:

"It may be said that this is a penal statute, and therefore it is to be construed in favor of the delinquent, and that we have a right to expect that the State courts will construe the penalty as not attaching to the charge for each head of stock, but only to that upon the separate bunches shipped by different individuals. But is the language so clear that there is no

doubt as to the construction? Is ther not enough in it to justify a construction which may be accepted by the trial courts and approved by the Supreme Court of the State, and the construction of a State satute by the Supreme Court of the State is in a case like this conclusive upon us. Must the party upon whom such a liability is threatened take the chances of the construction of a doubtful statute? If the one construction is placed upon it, then obviously, even accepting the largest estimate of value placed by any witness upon the property of the company, a single day's violation of the statute would exhaust such entire value in satisfaction of the penalties incurred. In this feature of the case we are brought face to face with a question which legislation of other states is presenting. Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defence subject to the condition that, upon failure to make good that claim or defence the penalty for such failure either appropriates all of his property, or subjects him to extravagant and unreasonable loss? Let us make some illustrations to suggest the scope of this thought.

"Suppose a law were passed that if any laboring man should bring or defend an action and fail in his claim or defence, either in whole or in part, he should in the one instance forfeit to the defendant half of the amount of his claim, and in the other be punished by a fine equal to half of the recovery against him, and that such law by its terms applied only to laboring men, would there be the slightest hesitation in holding that the laborer was denied the equal protection of the laws? The mere fact that the courts are open to hear his claim or defence is not sufficient, if upon him, and upon him alone, there is visited a substantial penalty for a failure to make good his entire claim or defence. Take another illustration: Suppose a statute that every corporation failing to establish its entire claim, or make good its entire defence, should as a penalty therefor forfeit its corporate franchise, and that no penalty of any kind except the matter of costs was attached to like failures of other litigants, could it be said that the corporations received the equal protection of the law? Take still another illustration: Suppose a law which, while opening the doors of the courts to all litigants, provided that a failure of any plaintiff or defendant to make good his entire claim or entire defence should subject him to a forfeiture of all his property or to some other great penalty;

then, even, if, as all litigants were treated alike, it could be said that there was equal protection of the laws, would not such burden upon all be adjudged a denial of due process of law? Of course, these were extreme illustrations, and they serve only to illustrate the proposition that a statute (although in terms opening the doors of the courts to a particular litigant), which places upon him as a penalty for a failure to make good his claim or defence, a burden so great as to practically intimidate him from asserting that which he believes to be his rights is, when no such penalty is inflicted upon others, tantamount to a denial of the equal protection of the laws. It may be said that these illustrations are not pertinent because they are of civil actions, whereas this statute makes certain conduct by the stock yards company a criminal offence, and simply imposes punishment for such offence: that it is within the competency of the legislature to prescribe penalties for all offences, either those existing at common law or those created by statute; and further, that although that the penalties herein imposed may be large, yet obedience to a statute like this can only be secured by large penalties; for otherwise the company, being wealthy and powerful, might defiantly disregard its mandates, trusting to the manifold chances of litigation to prevent any serious loss from disobedience. A penalty of a dollar on a large corporation, whose assets amount to millions, would not be very deterrent from disobedience. It is doubtless true that the State may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations; and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute the question would be very different from that here presented. But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts, that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is deprived of the equal protection of the laws."

The evidence shows that one case under this provision of the act has already been tried in the Superior Court of Wake county against the complainant as a corporation and one of its agents at that place. In that case the court imposed a fine of thirty thousand dollars against the company, and

notified the agent that if he would stop selling tickets at a price that was authorized by the decree of this court the judge would impose a nominal punishment, but if he did not, the court would not say what it would do until it had received an answer.

In making this reference I do not wish to be understood as criticising the State court, for there is no one in the State for whom I entertain a higher regard than Judge Long.

It is also shown by the uncontradicted evidence in this case that at least five thousand tickets are sold daily by complainant at its various offices in the State, in its intra-state business, thereby making it possible for it to be sued five thousand times in one day for penalties amounting to five hundred dollars in each instance on account of its failure to comply with the statute fixing passenger rates.

Thus it will be seen that by an enforcement of the statute judgments can be obtained against the complainant for the sum of two million and five hundred thousand dollars for each day. The aggregate penalties which could be obtained for one day would amount to a sum more than eight times as much as the sum involved in the original suit for one year between complainant and defendants.

This system of legislation is also condemned by Judge Lacombe, in the case of Consolidated Gas Co. *vs.* Mayor, 146 Fed. Rep. 150, and the conclusion is irresistible, from what this distinguished jurist has to say that such a system of penalties is unconstitutional and void. This not only applies to penalties in favor of individuals against the company, but also as to penalties against agents of the company which would render it utterly impossible for the company to carry on its business while having an orderly inquiry made by the courts as to its constitutional rights.

I am therefore of the opinion that the section of the act attempting to impose penalties and fines is unconstitutional and void upon the face of the act.

An order dismissing the petitioners from the custody of the officers of the State court will be entered and a copy of the same will be certified to the Police Justice of the city of Asheville and the Sheriff of Buncombe county, in whose custody petitioner is.

EXHIBIT B.

United States of America, Eastern District of North Carolina.

IN THE CIRCUIT COURT.

IN EQUITY.

SOUTHERN RAILWAY COMPANY, *Complainant*,

versus

FRANKLIN MCNEILL, SAMUEL L. ROGERS, EUGENE C. BEDDINGFIELD, ROBERT D. GILMER, and HAYDEN CLEMENT, *Defendants*.

ALFRED P. THOM, WALKER D. HINES, W. B. RODMAN, and ALEX. P. HUMPHREY, Solicitors for Complainant.

JAS. E. SHEPHERD, FRED A. WOODWARD, VICTOR S. BRYANT, and WALTER E. DANIELS, Counsel for Defendants.

The bill alleges that the complainant is a corporation originally created under the laws of Virginia. Under its charter, and under authority from other states, it is authorized to own, lease, control and operate railroads not only in Virginia, but in other states of the union; that under this power, it has acquired and is operating a continuous line of railroad, over six thousand miles in length, extending through the states of Virginia, North Carolina,

South Carolina, Georgia, Alabama, Mississippi and Tennessee, and by trackage rights this system is connected with another system owned by complainant and lying in the states of Kentucky, Indiana and Illinois. The complainant as a common carrier of freight and passengers, is and has been since its organization engaged in both intra and interstate commerce over its line of road.

The defendants admit the authority of the complainant to own and operate roads in North Carolina, but deny that the state of North Carolina has surrendered or given up its right to supervise, regulate and control the complainant's line of railroad in North Carolina, and specially claims that the state has the power to fix and prescribe rates, both freight and passenger, and has the power to make rules and regulations governing the amount of freight, the furnishing of cars, and the power to prescribe penalties for any violation thereof, controlled only by the Fourteenth Amendment of the Constitution of the United States.

The General Assembly of North Carolina at its session of 1907, passed two laws regulationg rates, the subject matter of this controversy. (1) The Passenger Rate Act which provides, section one, for maximum passenger rate of two and one quarter cents per mile, except as to children twelve years of age or under, and as to these half price; and provides that the Corporation Commission may exempt all independently owned and operated lines of less than sixty miles in length, and certain newly constructed lines. Section 2. That wherever a road is owned, controlled or operated, by lease or any other agreement, by any other road, the rate for the road so owned shall be determined by the rate prescribed by the act for the road owning or operating the other. The Corporation Commission is required to publish the rates prescribed by the act prior to June 1st, 1907. Section 3 requires interchangeable books to be kept on sale at such stations as the Corporation Commission may designate, and requires railroads to honor mileage books issued by other roads. Section 4 provides a penalty of $500 against any railroad company violating any of the provisions of the act, and makes a servant of the company guilty of a misdemeanor.

The Freight Rate Act provides, section one, that the Corporation Commission shall not, in fixing the maximum freight rates, permit common carriers to receive a greater

toll for shipment over connecting lines than the sum of the present locals, less twenty-five per centum, and provides that when the freight rate on any road is not so high as the present tariff, the Commission may permit the same to be increased to the present standard; the Commission is authorized to reduce any tariff of rates when, in their opinion, such reduction shall be just, but has no power to increase any tariff of rates either by classification or otherwise. Section two provides penalties for rebating or discrimination. Section three: if any shipper shall make a written application for a car or cars for use in shipment of freight, if the railroad company shall fail to furnish the said cars within four days the company shall be penalized in the sum of five dollars per day, until the said cars are furnished. Section four provides certain penalties for failure to transport freight within a reasonable time. Section five directs the Corporation Commission to prepare and publish the tariff of rates, charges and tolls authorized to be charged and collected under this act.

The complainant alleges that at the same session of the General Assembly there were passed certain other laws regulating the business of complainant, and that the effect of said laws would be to greatly increase the cost of conducting its business and make the charge more burdensome than heretofore. Said acts are referred to by their titles as follows:

1. "An Act to provide for the assessment of Real Estate of Railroad Companies in stock law territory for local benefit," ratified March 8, 1907.

2. "An Act to prescribe the hours of service of employees for Railroad Companies engaged in the operation of trains," ratified March 8, 1907.

3. "An Act to authorize the Corporation Commission to require Railroads to erect and maintain Union Depots in towns of 2,000 inhabitants," ratified March 11, 1907.

4. "An Act to extend and enlarge the power of the Corporation Commission," ratified March 11, 1907.

Complainant contends that it has property in North Carolina devoted to the business of carriage, freight and passenger, of the assessed value for taxation of $26,134,865.00, and that of this amount $7,213,222.74 is devoted to the intrastate commerce of North Carolina. That the property of complainant like all other property in North Carolina, is worth

more commercially than its assessed tax valuation. That the bonded indebtedness of the complainant, applicable to its North Carolina property, is $24,623,078.29, the annual interest charge on said indebtedness is $714,103.08. In addition to its annual interest charge complainant is compelled to pay for rentals and trackage in North Carolina $481,189.99. That the part of said interest, rental and trackage charges devoted to intra-state business in North Carolina is $329,900.89 per annum, and this does not consider any question of stock or dividends on stock. The defendants in their answer admit the passage of the laws referred to and admit the tax valuation of the property, deny any knowledge of the validity of the bonded indebtedness or the amount thereof, but allege that it is in excess of the value of the property, and allege that the complainant's stock is watered, and that the amount of bonded indebtedness and the amount of stock are merely items and elements in ascertaining the value of the property, and in ascertaining what is a just, fair and reasonable compensation in fixing the rates.

The complainant contends that the effect of the act in respect to freight rates, and of the act in respect to passenger rates, whether taken separately or together, would, if enforced, as will appear from the figures stated in the bill, be to deprive the complainant of its property without due process of law.

The complainant contends that under the laws of North Carolina the Corporation Commission is charged with the duty of making just and reasonable rates for the transportation both of freight and passengers, that it is charged with the duty of making full investigation of every element which enters into and constitutes one of the things required to be considered in fixing such rate; that prior to March 2, 1907, the Corporation Commission, after full investigation as required by law, made and established a passenger rate for complainant's lines of three and one-quarter cents per mile for first class fare and two and three-quarter cents per mile for second class fare, and established the present standard tariff of freight rates and provided that where there was a haul over two connecting lines, the rate charged by such common carriers should be the sum of the locals, less fifteen per cent. Complainant contends that these rates are in the main reasonable and just, and that the same were fixed by the body charged under the law, with that duty, and

wherever they are unreasonable and unjust, they are too low, and should be increased.

The complainant contends that its existing rate fabric is upon the whole properly adjusted, not only in its relation to intra-state traffic, but in its relation between its inter-state rates and its intra-state rates in North Carolina and in other states. It admits that there may be cited a few instances needing correction, but alleges that they are negligible and not to be considered in this matter; that the present rates do not yield more than a just and resaonable return upon the value of the property used in the service, and that the rate charged is not higher than a just and reasonable compensation for the service rendered, whether considered on the basis of a fair return on the money invested or in respect to the service rendered.

The complainant contends that the effect of the act in respect to Passenger Rates and the act in respect to Freight Rates, whether taken separately or together, if enforced, would be to so reduce the return to complainant for the service rendered, that it would deprive complainant of its property without just compensation, without due process of law, and deny to it the equal protection of the laws, and would interfere with interstate commerce.

Complainant contends that if the rates mentioned are put into effect and enforced, they would reduce the revenue of complainant upon its intra-state business about $300,000.00 per annum, that the effect of this reduction would be to leave to the complainant only about $29,000.00 net earnings from its intra-state business, assuming that the costs of operation did not increase, and that the number of passengers and tonnage remained relatively the same. Complainant contends that this would be true not allowing anything for the interest on the bonded indebtedness or for the payment of trackage or rentals; that it could not pay the interest on its bonds, much less pay any dividends, and that this return would be only .39 of 1 per cent. on the assessed valuation of complainant's property devoted to intra-state business. The complainant contends further that, owing to the increased and increasing cost of operating expenses, occasioned in part by the legislation of the State of North Carolina, and in part by the general increasing price of commodities, this small balance would be wiped out and a deficit would be left, even though complainant should

continue to use, as it has done in the past, the utmost economy in the management of its property.

The complainant contends that section three of the act in respect to freight rates, which requires complainant, at any time upon the written application of any shipper to within four days furnish such shipper with a car or cars as demanded, and the complainant fails to furnish such cars, it shall be liable for a penalty of five dollars per day, until said cars are furnished, is unconstitutional and void, for that the requirements are peremptory and no exception is made on account of the liability of the carrier to comply with such request, although the cars may be in other states, may be actually engaged in interstate commerce, or may be prevented by an accident, congestion of traffic, or other causes beyond the control of the complainant, and is such a regulation as cannot, under the law, be made, and is a regulation depriving the complainant of the right to use its cars in fair and just proportion according to the demands made upon it, both for interstate and intrastate business. That said section is unconstitutional and void for that it undertakes to classify the said roads in the State without any just and reasonable basis for such classification, and denies the equal protection of the laws in violation of the Fourteenth Amendment.

The complainant contends that the said acts in respect to both freight and passenger rates by a system of enormous fines and penalties, therein sought to be imposed, close the doors of the courts to complainant, and make the terms upon which complainant may enter the courts so unequal as compared with other suitors, that it denies to complainant the equal protection of the laws and due process of law in violation of the Fourteenth Amendment.

Complainant contends that section three of the act in respect to passenger rates requiring the complainant to keep on sale mileage books, which shall be good in the hands of the person named therein on all the roads in the State on which the fare is the same or less than the fare on the road of the company selling such books, and requires the complainant to redeem such mileage books, or mileage sold by another company, in payment of transportation, is unconstitutional and void, for that the regulations are so unreasonable and unjust as to deprive the complainant of the right to use its property in the conduct of its business, and

such laws are not within the power of the General Assembly to enact, but imposes unjust and unreasonable burdens on complainant, and deprives it of its property without due process of law.

Complainant contends that the classification of railroads as attempted both in the freight rate act and passenger rate act is unjust, unreasonable and unlawful as having no just and proper basis on which to make such classification, and is in violation of the Fourteenth Amendment of the Constitution of the United States.

Complainant contends that under the said acts the Corporation Commission was, as to the act in respect to freight rates before the said act went into effect, required to prepare and publish the tariff of rates authorized by the said act, and as to the act in respect to passenger rates, the Corporation Commission was required by said act and the laws of North Carolina to prepare a just and reasonable rate for the said railroads in North Carolina as prescribed in said act, and was required on or before June 1st, to publish said rate so fixed, and the said Commission was further required to designate the places at which mileage books should be kept on sale, and that the commission was, under the laws of North Carolina, specially charged with the duty of enforcing the said two acts, and of the enforcement of the laws relating to common carriers, and was charged with the duty of regulating said common carriers, and had full control and supervision over such common carriers, and that the Attorney General and the Assistant Attorney General were specially charged with the duty of enforcing the laws of North Carolina, including the said two acts as against the complainant.

The complainant contends that it has the right, under the constitution, whenever the circumstances may justify it, to increase its rates, either passenger or freight, when by the increased price of commodities of all kinds including labor, the cost of operation becomes such as to make the then existing rate so low as to be confiscatory, and that it has this right, as an incident of property; and that the act of the legislature in so far as it tends to deprive the complainant of its rights, is in conflict with the Fourteenth Amendment of the Constitution, and is, therefore, void.

The complainant contends that it had a right to come into

a court of Chancery and make defendants, those representatives of the state who were specially charged, under law, with the performance of the duty of enforcing these acts, and have the validity and reasonableness and justness of the rates inquired into, and to have inquired into by a court of Chancery the effect of such law upon complainant's property, and to have such property protected pending the litigation.

The defendants admit that prior to March 2, 1907, the corporation Commission, in the exercise of the power conferred upon it by law, had established a passenger tariff of three and a quarter cents per mile for first class fare and two and three-quarter cents per mile for second class fare, and had established the present standard tariff of freight rates for intra-state traffic, and had provided for a reduction of fifteen per centum from the sum of the locals on a joint haul. The defendants contend, however, that a reduction of the rates heretofore established, as provided for in these acts, would not be unreasonable and unjust and say:

(1.) That while the maximum rates fixed by the Commission prior to the acts of March 2, 1907, were for passenger traffic three and one-quarter cents per mile for first class fare and two and three-quarter cents per mile for second class fare, yet that complainant habitually sold mileage books at two and a half cents per mile. (2.) That not only did complainant sell mileage books, good over its lines, at two and a half cents per mile, but that during the summer season, that is between June 1st and October 31st, of each year, it sold season tickets from points in Eastern and Central Carolina to points in Western Carolina at the rate of two cents per mile. (3.) That complainant sold tickets to ministers of the gospel at about two cents per mile. (4.) That the average of all tickets sold in North Carolina for intra-state travel was during the year ending June 30, 1904, 2.39 cents per mile, and during the year 1905, 2.386 cents per mile, and during the year 1906, 2.508 cents per mile, and that the average over complainant's entire system for the year 1906, was only 2.41 cents per mile. (5.) That complainant in violation of the laws of the state carried many influential people free, and that this was done to get their business or to influence them. (6.) That the complainant pays exorbitant and extravagant salaries, and paid out last year large sums in settlement with persons injured on its system, or while in its employment, and large sums

for lost or damaged goods, and large sums for clearing of wrecks, and large sums for advertising its business. The defendants allege that if complainant would stop selling tickets and transporting persons at less than two and a quarter cents, and charge all persons two and a quarter cents that the act in respect to passenger rates would not reduce the revenue of complainant as much as complainant claims.

Defendants contend that the figures given in the bill in reference to complainant's earnings are correct. They allege that the complainant was required by law to make report to the Corporation Commission, both as to its earnings and operating expenses, that such reports were made, and, based on such reports and after hearing, the General Assembly of North Carolina passed the two acts in question, and that, if the figures given in the said reports be taken as true, the complainant would be able to lose all that it claims that it would lose under the said acts, and would have a sufficient net revenue left to pay five and one-half per cent. per annum upon the assessed value of that part of its property devoted to intra-state business.

Defendants contend that the complainant not only earns a large revenue on its intra-state business, but considering both its intra-state and inter-state business and its entire operating expenses on that part of its line lying in North Carolina, its net earnings are about ten per cent. of the assessed value of its property.

The defendants contend that the General Assembly abolished two classes of fares and that the result of such act would be a great saving in the operating expenses of complainant, and that the growth of the country and the greatly increased travel which would be stimulated by the reduction of rates, will increase complainant's revenue without sensibly increasing its expenses.

The defendants contend that even in its reports made to the Corporation Commission the complainant has incorrectly stated its operating expenses in making the partition between the cost of intra-state and inter-state business, and that if the true rule were adopted, that is the cost of doing intra-state and inter-state business distributed proportionately, the rates for complainant's lines would be greatly reduced below that named in the acts.

Defendants contend that the acts in question are self-executing; that none of the defendants have any special duty imposed upon them, or either of them, in reference to said acts, or either of them, and that this is a suit against the state of North Carolina, and forbidden by the Eleventh Amendment of the Constitution of the United States; that the laws are constitutional, and positive in their provisions, and are self-executing and that this suit cannot be maintained.

In considering the motion to continue the restraining order heretofore granted until the final hearing of the cause, the court is called upon to determine, first, as to whether it has jurisdiction of the parties as well as the subject matter of the controversy involved in this proceeding.

It is insisted by counsel for defendants that this is a suit against the state within the meaning of the Eleventh Amendment of the Constitution of the United States, and that therefore, this court is without jurisdiction. Counsel cite in support of this contention the case of Fitts *v.* McGhee, 172 U. S., 516.

Complainant contends that this is not a suit against the State of North Carolina. As to the Corporation Commissioners, complainant contends in the first place, that they are charged with the duty of making the rates, both passenger and freight, for the railroad companies in North Carolina, and even if this is not true, that they have essential duties to perform in connection with the putting into effect of the freight and passenger acts of 1907.

Complainant refers to the following statutes as applicable to the connection of the Commissioners with the rates in question:

Revisal 1905, Chapter 61, Railroads, Sub-head IV. CORPORATE POWERS.

Section 2567. General Powers. Every railroad corporation shall have power:

"7. RIGHT TO CARRY PERSONS AND PROPERTY.

"To take and convey persons and property on its railroad by the power or force of steam, electricity or animals, or by any mechanical power, and to receive compensation therefor."

"9. REGULATION OF TIME AND MANNER OF TRANSPORTATION.

To regulate the time and manner in which passengers and property shall be transported and the compensation to

be paid therefor; and such compensation for any passenger and his ordinary baggage shall not exceed five cents per mile."

Section 2618. First and Second Class Accommodations. "All railroad companies shall furnish first and second class passenger accommodations."

Chapter 20. CORPORATION COMMISSION, Sub-head III. POWERS.

Section 1066. "**General Powers.** The corporation commission shall have such general control and supervision of all railroad, street railway, steamboat, canal, express and sleeping car companies or corporations and of all companies or corporations engaged in the carrying of freight or passengers, of all telegraph and telephone companies, of all public and private banks and all loan and trust companies or corporations, and of all building and loan associations or companies, necessary to carry into effect the provisions of this chapter, and the laws regulating such companies."

Sub-head VII. JURISDICTION.

Section 1099. "**Freight and Passenger Rates.** The Commission shall make reasonable and just rates—

1. Of freight, passenger and express tariffs for railroads, street railways, steam boats, canal and express companies or corporations, and all other transportation companies or corporations engaged in the carriage of freight, express or passengers.

2. For the through transportation of freight, express or passengers.

3. Of charges for the transportation of packages by any express company or corporation.

4. Of charges for the use of railroad cars carrying freight or passengers.

5. And rules and regulations as to contracts entered into by any railroad company or corporation to carry over its line or any part thereof the car or cars of any other company or corporation.

6. And shall make, require or approve what is known as 'milling-in-transit' rates on grain; or lumber to be dressed and shipped over the line of the railroad company on which such freight originated.

7. And, conjointly with such railroad companies, shall have authority to make special rates for the purpose of developing all manufacturing, mining, milling and internal improvements in the state.

Nothing in this chapter shall prohibit railroad or steam boat companies from making special passenger rates with excursion or other parties, also rates on such freights as are necessary for the comfort of such parties, subject to the approval of the commission."

Sub-head VIII. RATES.

Section 1104. "**How Fixed.** In fixing any maximum rate or charge, or tariff of rates or charges for any common carrier, person or corporation subject to the provisions of this chapter the commission shall take into consideration if proved, or may require proof of, the value of the property of such carrier, person or corporation used for the public in the consideration of such rate or charge or the fair value of the service rendered in determining the value of the property so being used for the convenience of the public. It shall furthermore consider the original cost of the construction thereof and the amount expended in permanent improvements thereon and the present compared with the original cost of construction of all of its property within the state; the probable earning capacity of such property under the particular rates proposed and the sum required to meet the operating expenses of such carrier, person or corporation and all other facts that will enable them to determine what are reasonable and just rates, charges and tariffs."

Section 1106. "**Revision of Rates.** The Commission shall from time to time, and as often as circumstances may require, change and revise or cause to be changed and revised any schedules of rates fixed by the Commission, or allowed to be charged by any carrier of freight, passengers, or express, or by any telegraph or telephone company."

Section 1109. "**Published.** All carriers shall, whenever required by the commission, file with it a schedule of their rates of charges for freight and passengers, and the commission is authorized and required to publish the rates, or a summary thereof, in some convenient form for the information of the public, and quarterly thereafter the changes made in such schedules if they deem it advisable."

Section 1112. "**Schedule of Rates, Evidence.** The schedule containing rates fixed by the commission shall, in suits brought against any company wherein is involved the charges of any company for the transportation of any passenger or freight or cars or unjust discrimination in relation thereto, be taken in all courts as *prima facie* evidence

that the rates therein fixed are just and reasonable rates of charges for the transporation of passengers and freights and cars upon the railroads. All such schedules shall be received and held in all suits as *prima facie* evidence, the schedules of the commission without further proof than the production of the schedules desired to be used as evidence, with a certificate of the clerk of the commission that the same is a true copy of the schedule prepared or approved by it for the railroad company or corporation therein named."

Sub-head IV. APPEALS.

Section 1078. Rates Vacated Pending Appeal, How.

The rates of freight and fare fixed by the commission shall be and remain the established rates and shall be so observed and regarded by corporations appealing until the same shall be changed, reversed or modified by the judgment of the superior court, unless the railroad company shall within fifteen days file with said commission a justified undertaking, in a sum to be fixed by the commission, conditioned to pay the state of North Carolina the difference between the aggregate freights charged or received and those fixed by said commission, and to make a report of freights charged or received, every three months during the pendency of such appeal; and whenever such difference in freights equals or exceeds the penalty of such undertaking the commission may require another to be executed and filed with them. From the time the undertaking first mentioned is filed the judgment appealed from shall be vacated; but a failure for ten days to file any additional undertaking required by the commission shall *eo instanti* revive such judgment. Out of the funds paid into the state treasury under this section there shall be refunded to shippers the overpaid freight ascertained by the final determination of the appeal on the recommendation of the commission, if application therefor is made within one year from such final determination."

Sub-head V. INJUNCTION.

Section 1082. "When Granted;" Bond.

"No judge shall grant an injunction, restraining order or other process staying or affecting, during the pending of any appeal, the enforcement of any determination of the corporation commission fixing rates or fares, without requiring as a condition precedent the executing and filing with the corporation commission of a justified undertaking in the

sum of not less than twenty-five thousand dollars for any company whose road is of less length than fifty miles, and fifty thousand dollars for any company whose road is over fifty miles in length, conditioned that the company will make and file with the corporation commission a sworn statement every three months during the pending of the appeal of the items of freight, with names of shippers, carried over such company's road within the preceding ninety days, showing the freight charged and those fixed by the corporation commission; and in the event the determination of the corporation commission appealed from is affirmed in part or in whole such company shall within thirty days pay into the treasury of North Carolina the aggregate difference between the freights collected and those fixed by the final determination of the matter appealed."

Sub-head VI. PENALTIES.

Section 1086. "For Violating Rules. If any railroad company doing business in this state by its agents or employees shall be guilty of a violation of the rules and regulations provided and prescribed by the commission, and if after due notice of such violation given to the principal officers thereof, if residing in the state, or, if not, to the manager or superintendent or secretary or treasurer if residing in the state, or if not then to any local agent thereof, ample and full recompense for the wrong or injury done thereby to any person or corporation as may be directed by the commission shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of five hundred dollars."

Section 1087. "Refusing to Obey Orders of Commission. Any railroad or other corporation which violates any of the provisions of this chapter or refuses to conform to or obey any rule, order or regulation of the corporation commission shall, in addition to the other penalties prescribed in this chapter, forfeit and pay the sum of five hundred dollars for each offense, to be recovered in an action to be instituted in the superior court of Wake county, in the name of the state of North Carolina on the relation of the corporation commission; and each day such company continues to violate any provision of this chapter or continues to refuse to obey or perform any rule, order or regulation prescribed by the corporation commission shall be a separate offense."

Section 1092. "Action For, When and How Brought. An action for the recovery of any penalty under this chapter shall be instituted in the county in which the penalty has been incurred, and shall be instituted in the name of the state of North Carolina on the relation of the corporation commission against the company incurring such penalty; or whenever such action is upon the complaint of any injured person or corporation, it shall be instituted in the name of the state of North Carolina on the relation of the corporation commission upon the complaint of such injured person or corporation against the company incurring such penalty. Such action shall be instituted and prosecuted by the Attorney General or the Solicitor of the judicial district in which such penalty has been incurred, and the judge before whom the same is tried shall determine the amount of compensation to be allowed the Attorney General or such solicitor prosecuting said action for his services, and such compensation so determined shall be taxed as part of the cost. The procedure in such actions, the right of appeal and the rules regulating appeals shall be the same as are now provided by law in other civil actions."

The freight rate act contains no clause repealing prior laws. The passenger rate act contains no repealing clause except section 6, which expressly repeals section 2618 of the Revisal of 1905 (which provides for first and second class passenger accommodations). This section also repeals "all laws and clauses of laws in conflict with this act."

In other words it is insisted by complainant that, at the date of the passage of the act in question, the laws of North Carolina contained ample provision for the control and supervision of railroads by the corporation commission, and that such commission was fully empowered to inquire into and determine what rates should be charged by the various railroad companies operating their lines in the state. That the act of 1907, in so far as the freight rate act is concerned, contains no provision repealing laws that were in existence at that time; that the passenger rate act only contains a clause repealing section 6, which expressly repeals section 2618 of the Revisal of 1905. That under these circumstances all laws then in existence, not inconsistent with the act of 1907, are still in force as a part of the laws relating to the management and control of railroads in that state.

The rule by which the court is governed in ascertaining

what part of a prior statute is repealed by a later one, is laid down by the Supreme Court of North Carolina in the following language:

"A statute will not be construed as repealing a prior one on the same subject (in the absence of express words to that effect) unless there is an irreconcilable repugnancy between them or unless the new law is evidently intended to supersede the prior one upon the subject, and to comprise in itself the sole and complete system of legislation on that subject."

Black on Interpretation of Laws, 112;
Endlich on Interpretation of Statutes, 210;
Sutherland on Statutory Construction, Sec. 138.

"The two acts now being construed being affirmative, and the subject being such that both may stand together, they both should have concurrent efficacy (1 Blk. 90) unless they be repugnant or inconsistent, or it should appear that the legislature intended to cover the whole subject embraced in both and to prescribe the only rule in respect of that subject in the later act."

College *vs.* Lacy, 130 N. C. 364.

It is well settled that a repeal by implication is not favored.

Jones *v.* Ins. Co. 66 N. C. 499;
Greensboro *v.* McAdoo, 112 N. C. 360;
State *v.* Monger, 111 N. C. 675;
State *v.* Snow, 117 N. C. 774.

Section one of the passenger rate act of 1907, is as follows:

"No railroad company doing business as a common carrier of passengers in the state of North Carolina, except as hereinafter provided, shall charge, demand or receive for transporting any passenger and his or her baggage, not exceeding in weight two hundred pounds, from any station on its railroad in North Carolina to any other station on its railroad in North Carolina, a rate in excess of two and one-quarter cents per mile, and for transporting children twelve years of age or under one-half the rate described, etc."

Then follows a proviso, giving to the corporation commission the power to exempt certain railroads from the operation of the statute and to permit them to charge a higher rate.

The foregoing provisions in section one do not undertake to make the rate of passenger charges, but simply to fix a

maximum limit, so that the effect of section one is to substitute "two and one-quarter cents per mile, and for transporting children twelve years of age and under, one-half of the rate above described" in place of the word "five" in line four of sub-section nine of section 2567 of the Revisal, and also to provide that at least two hundred pounds of baggage shall be carried for each passenger without extra charge.

Under sub-section 9 of section 2567, railroad companies had the right to make the compensation for their services within the limit of five cents per mile, which was fixed as the maximum by the section in question. However, the court is of opinion that this sub-section repealed by implication sub-section one of section 1099 of the Revisal (passed in 1899), which imposed upon the commission the duty of making rates for freight and passenger service on railroads, thus taking the power to make rates from the railroads. Sub-section 9 of section 2567 has now been expressly repealed by section 7 of the act of March 11, 1907 (Chapter 469, Laws of 1907), which act is entitled "An act to extend and enlarge the powers of the North Carolina Railroad Commission." Therefore, it necessarily follows that the power of making railroad rates still rests upon the commission and that the acts sought to be restrained are not self-executing. The act of March 11 shows that the legislature clearly intended that all of the acts concerning railroad rates should be considered as being part of the law relating to the subject.

It is proper to consider a repealed statute in arriving at a proper construction of the several acts. Wilson *v.* Jordan, 124 N. C. 638.

The commission has of course no right to establish and publish rates higher than those allowed in the act of 1907; yet, within that limit the power and duty devolve upon it and upon it alone, to make rates for railroad companies.

The duty of the commission to make rates for railroad companies subject to the limitation contained in the act of 1907, is imposed by section 1106 of the Revisal which provides:

"The commission shall from time to time, and as often as circumstances shall require, change and revise or cause to be changed or revised, any schedule of rates fixed by the commission or allowed to be charged by any carrier of freight, passenger, express or by any telegraph or telephone company."

As an illustration, suppose that after an investigation by the corporation commission, under the authority conferred upon it by the statute of the state, and in the performance of the duty therein imposed, it should appear that a flat rate of two cents a mile or less would be a reasonable and just rate, could it be contended, that under the provision of the foregoing section the commission would not have the right to "change and revise or cause to be changed or revised" the rates as now established by law?

In establishing rates the commission is governed and controlled by the provisions of section 1104 quoted, and as stated, cannot make rates higher than those provided for in the statutes of 1907, yet the duty devolves upon it to say what shall be just and reasonable rates, within the maximum prescribed by the legislature.

If this be a proper construction of the act, it makes one harmonious whole and thus gives force and effect to every statute relating to the subject in accordance with the intention of the legislature, which, the court is of opinion, was that the commission might make rates lower than two and a quarter cents except as to certain roads.

In this view of the law, the corporation commissioners, are charged with a duty in connection with the enforcement of the act of 1907, and are, therefore, proper parties to this suit.

Even if it were conceded that, railroad rates can be established other than by the commission, yet the complainant contends that the commission is specially charged with important duties in connection with the enforcement of the acts in question by the laws of North Carolina. That among other things it is the duty of the corporation commission to take necessary steps to secure the enforcement of section four, which provides for the prosecution of penalty suits against the complainant for a failure to comply with the provisions of section one, and likewise, to prosecute its agents and employees for a failure on their part to comply with that section. As to the freight rate act it is not seriously contended by the defendants that that act can go into effect in the absence of action on the part of the commission, since section one of that act provides, "that the corporation commission, created by the laws of North Carolina shall not, in fixing the maximum rates and charges, or tariff of rates or charges for any common carrier transporting freight in

North Carolina permit or allow any such common carrier to charge, collect or receive a greater toll, charge or rate for the transportation of any article of freight or commodity embraced in the present classification and prescribed, etc." And section five of the act provides that, "The Corporation Commission is hereby directed to prepare and publish a tariff of rates, charges and tolls, to be charged and collected by railroad companies in this State, as authorized by this act, on or before the first day of July, one thousand nine hundred and seven."

The foregoing provisions are important and should be considered as bearing directly upon the question as to whether the court, independently of the provisions hereinbefore referred to, does not have jurisdiction.

The defendants' counsel rely upon the case of Fitts *v.* McGhee, 172 U. S., 516, as before stated, to sustain their contention that this is a suit against the State.

In that case, the Memphis & Charleston Railroad owned the Florence Bridge, under an act of the legislature of the State of Alabama passed in 1895. It was provided what should be charged as maximum tolls on that bridge and it was also provided that any one charging more should be subject to a penalty of twenty dollars to be sued for in a court of a justice of the peace. In that case no state officer was charged with the performance of any duty in connection with the enforcement of the act. There was nothing in the act which required the Attorney General or the Governor to perform any duty in connection with the execution or enforcement of the same. When that act was passed the cases of Samuel Thomas *vs.* Memphis & Charleston Railroad Company and Central Trust Company of New York *vs.* Memphis & Charleston Railroad Company were pending in the court below; and on the 14th day of February, 1895, Charles M. McGhee and Henry Fink, receivers of the Memphis & Charleston Railroad in those causes, having first obtained leave to do so, filed a bill in the name of themselves and the railroad company against "the State of Alabama, William C. Oates, as Governor of the State of Alabama, and William C. Fitts, as Attorney General of the State of Alabama." In the meantime a discontinuance was taken as to the Governor and the State of Alabama, and the cause was proceeded with against the Attorney General and the Solicitor of the 11th Judicial Circuit of Alabama.

In a very able and exhaustive opinion delivered by Mr. Justice Harlan in that case it was held by the Supreme Court that neither the Attorney General of Alabama, nor the Solicitor of the 11th Judicial Circuit of that State was charged by law with any special duty in connection with the enforcement of the act of February 9, 1895.

The act of the legislature in that instance was self executing and to all intents and purposes was as much an independent and general law of the State as any of the statutes enacted by the legislature. Under such circumstances, the only possible means by which the constitutionality of such an act could have been tested would have been by taking an appeal or writ of error from a judgment rendered thereon to the Supreme Court of the State, and, if it appeared that a federal question was necessarily involved, or passed upon by the court, thence to the Supreme Court of the United States.

In that case, Mr. Justice Harlan said:

"It is to be observed that neither the Attorney General of Alabama nor the Solicitor of the eleventh judicial circuit of the state, appear to have been charged by law with any special duty in connection with the act of February 9th, 1895. In support of the contention that the present suit is not one against the State, reference was made by counsel to several cases, among which were Poindexter *v.* Greengow, 114 U. S., 270; Allen *v.* Baltimore & Ohio R. Co., 114 U. S., 311; Pennoyer *v.* McConnaughy, 140 U. S., 1; *In re* Tyler, 149 U. S., 164; Reagan *v.* Farmers' Loan & Trust Co., 154 U. S., 362, 388; Scott *v.* Donald, 165 U. S., 58; and Smyth *v.* Ames, 169 U. S., 466. Upon examination it will be found that the defendants in each of those cases were officers of the state, specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or about to commit some specific wrong or trespass to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals holding official positions under a state, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state. In

the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional."

The learned Justice clearly states the distinction between the case of Fitts *v.* McGhee and the one now under consideration. There is a manifest distinction between that case and the case at bar. In this case it appears that the members of the Corporation Commission of North Carolina are "specially charged" with the performance of duties in connection with the enforcement of the act of the legislature of North Carolina. Likewise, the Attorney General is charged with the performance of a duty in connection therewith.

Section 1066 of the Revisal of North Carolina of 1905, is as follows:

"The corporation commission shall have such general control and supervision of all railroads, street railway, steamboat, canal, express and sleeping car companies or corporations and of all other companies and corporations engaged in the carrying of freight and passengers, of all telegraph and telephone companies, of all public and private banks and all loan and trust companies or corporations, and of all building and loan associations or companies, necessary to carry into effect the provisions of this chapter, and the laws regulating such companies." (1899, c. 164, s. 1; 1901, c. 679).

Section 1113 of the same chapter is as follows:

"The commission, whenever in its judgment any corporation has violated any law, shall give notice thereof in writing to such corporation, and, if the violation or neglect is continued after such notice, shall forthwith present the facts to the Attorney General, who shall take such proceedings thereon as he may deem expedient." (1899, c. 164, s. 8).

Section 5380, c. 115 end of chapter VII of the same Revisal is as follows:

"It shall be the duty of the Attorney General—

1. To defend all actions in the Supreme Court in which the state shall be interested, or is a party; and also when requested by the governor or either branch of the general assembly to appear for the state in any other court or tribunal in any cause or matter, civil or criminal, in which the state may be a party or interested.

2. At the request of the governor, secretary of state, treas-

urer, auditor, corporation commissioners, insurance commissioner, or superintendent of public instruction, he shall prosecute and defend all suits relating to matters connected with their departments.

3. To represent all state institutions, including the state's prison, whenever requested so to do by the official head of any such institution.

4. To consult with and advise the solicitors when requested by them in all matters pertaining to the duties of their office.

5. To give, when required, his opinion upon all questions of law submitted to him by the general assembly, or by either branch thereof, or by the governor, auditor, treasurer, or any other state officer."

Section 2 of the act of 1907, relating to passenger rates, is as follows:

"In the case that any railroad company operating as a common carrier of passengers in the state of North Carolina is owned, controlled or operated by any other railroad company doing business in this state, the rate for carrying passengers thereon as prescribed in this act shall be determined for said railroad by the rate prescribed by this act for the railroad company which owns, controls or operates the same; and the North Carolina Corporation Commission shall publish the rates fixed by this act for the several railroad companies operating in this state, on or before the first day of June 1907."

It is also, among other things, provided in section 1, as follows:

"Provided that the corporation commission of North Carolina is hereby authorized and empowered to permit all independently owned and operated railroads in North Carolina whose mileage in said state is sixty miles or under to charge a rate for transporting passengers not in excess of the present rate fixed and prescribed for said road and also permit all railroads constructed within twelve months preceding the first day of January 1907, or at that time in course of construction for a term of two years from and after July first 1907, and also all such railroads as may be constructed within two years from January first, 1907, to charge such rate in excess of the rate above prescribed as the said commission may determine to be reasonable."

Section 2 makes it the duty of the commission to de-

termine whether a road is controlled or operated by another railroad, and when that is done, the rate must be determined and published.

It is insisted by counsel for defendants that there is nothing in the act of the legislature of 1907, which specially charges the corporation commission, or the Attorney General with the enforcement of such act. This contention in so far as it relates to passenger rates with the exception of section two of the act, is undoubtedly true. Notwithstanding that such is the case, it must be borne in mind that sections 1066, 1113, 5380, chapter 115 and sub-divisions, were a part of the general law relating to the management and control of railroads in North Carolina, and were in full force and effect at the date of the passage of the act in question and still remain undisturbed as a part of the law applicable to the subject under consideration. Under the well established rule of construction, these sections must be construed as forming a part of the law relating to the enforcement of any legislation that may have been enacted in regard to the subject of fixing maximum rates.

In the case of Wilson *v.* Jordan, 124 N. C. 683, the court, in discussing this phase of the question, said:

"All acts of the same session of the legislature upon the same subject-matter are considered as one act, and must be construed together, under the doctrine of *'in pari materia.'* State *v.* Bell, 25 N. C. 506; Black Interp. Laws, § 86; End. Interp. Laws § 45; Cain *v.* State, 20 Tex. 355. They should be considered *in pari materia,* whether passed at the same session or not. Simonton *v.* Lanier, 71 N. C. 498; Rhodes *v.* Lewis, 80 N. C. 136. Where a former act has been repealed or has expired by its limitation, when it is *in pari materia,* it must be considered in connection with the last act, and, if necessary, as a part of it. Potter, Dwar. St., p. 190. 'It certainly appears strange,' said Williams, J., in a late case, 'that, when an act of parliament is *per se* abolished, it shall virtually have effect through another act. But in that case the former act was substantially re-enacted. Reg. *v.* Merionethshire, 6 Adol. & Ellis, 343. It does, indeed, seem to be the prevailing doctrine (and it is more rational in itself than consistent with coeval maxims) that where one statute refers to another, which is repealed, the words of the former act must still be considered as if introduced into the latter statute.' Potter, Dwar. St., p. 192.

"In Rex *v.* Loxdale, 1 Burrows, 447, it is held (Lord Mansfield delivering the judgment of the court), 'That where there are different statutes *in pari materia*, though made at different times, or even where they have expired, and not referring to each other, they shall be taken and considered together as one system, and as explanatory of each other.' The same doctrine is held in New York, Smith *v.* People, 47 N. Y. 330, which is very much in point."

Therefore, the sections which refer to the supervision and control of railroads by the corporation commission, when read in connection with the act of 1907, as the same should be, it appears that the members of the corporation commission as well as the Attorney General are charged with the duty of securing the enforcement of the provisions of the act of 1907, and it is made their special duty to secure the enforcement of the provisions of Section 4 of the passenger act; hence it necessarily follows that they are proper parties to this proceeding. This conclusion is sustained by the principles enunciated in the case of Smyth *v.* Ames, 169 U. S. 466-70. Prior to the enactment of the statute of the state of Nebraska to "regulate railroads, classify freight, to fix reasonable maximum rates to be charged for the transportation of freight upon each of the railroads of the state and to provide penalties for the violation of this act," the legislature passed an act to regulate railroads, to prevent unjust discrimination, to provide a Board of Transportation and define its duty, etc. By this act the Attorney General, Secretary of State, the Auditor of public accounts, State Treasurer and Commissioner of public lands and buildings were constituted a Board of Transportation with power to appoint three secretaries to assist it in the performance of its duties and with authority to inquire into the management of the business of all common carriers subject to its provisions and obtain from such carriers full and complete information necessary to enable the Board thus established to perform its duties and to carry out the objects for which it was created.

Thus it will be seen that the Attorney General in that instance was not charged with the performance of any specific duty in regard to the enforcement of the rates in the state of Nebraska by the act which undertook to fix maximum rates, but that duty was imposed upon him as a member of the Board of Transportation by the provisions of a law which had been enacted prior to the passage of the act

fixing rates and that case is therefore on all fours with the case at bar.

In the case of Prout *v.* Starr, 188 U. S., 542, the court upheld a suit against the Board of Transportation and Attorney General of Nebraska arising out of the same statute involved in Smyth *v.* Ames, and in discussing the matter employed the following language:

"But by this appeal we are asked to declare that the Circuit Court had no jurisdiction because it appears, on the face of the bill, that the complaint is essentially against the state of Nebraska, and is in contravention of the Eleventh Amendment of the Constitution of the United States.

"It is a sufficient answer to this contention that it was made, considered and determined in Smyth *v.* Ames. In the opinion in that case it was said:

" 'Within the meaning of the Eleventh Amendment of the Constitution, these suits are not against the state, but against certain individuals charged with the administration of a state enactment, which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiffs. It is the settled doctrine of this court that a suit against individuals, for the purpose of preventing them as officers of a state from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of that Amendment. Pennoyer *v.* McConnaughy, 140 U. S., 1; *In re* Tyler, 149 U. S., 164, 190; Scott *v.* Donald, 165 U. S. 58, 68; Tindal *v.* Wesley, 167 U. S., 204, 220.' "

Suits and injunctions against the Attorney General of a state have been upheld in the recent cases of Railroad Commission of Louisiana *v.* Texas & Pacific Company, 144 Fed. Rep. 68 (Circuit Court of Appeals), and Consolidated Gas Company *v.* Mayer, 146 Fed. Rep. 150, 154. In the latter case it appears that the duty of the Attorney General with respect to the enforcement of the statute existed by virtue of his general duties imposed by a separate and antecedent statute.

In the case of Mississippi Railroad Company *v.* Illinois Central Railroad Company, 203 U. S., 335, 340, the court, among other things in discussing this question, said:

"The commission was created by the state of Mississippi under the authority of its constitution and laws for the pur-

pose of supervising, and, to some extent, controlling the acts of the railroads operating within the state. Such a commission is subject to a suit by a citizen. Reagan *v.* Farmer's Loan & Trust Co., 154 U. S., 363; Smyth *v.* Ames, 169 U. S., 466; Prout *v.* Starr, 188 U. S., 537."

In the case of Reagan *v.* Farmer's Loan & Trust Co., 154 U. S., 362, the Attorney General and the Railroad Commission of Texas were enjoined from the enforcement of the act. In that case it was strenuously insisted that it was a suit against the state and therefore in violation of the Eleventh Amendment of the Constitution of the United States. The Circuit Court as well as the Supreme Court held otherwise.

The Texas statute relating to the same (General Laws of Texas Ch. 51), reads as follows:

"Sec. 18. If any railroad, as aforesaid shall wilfully violate any other provisions of this act, or shall do any other act herein prohibited, or shall fail or refuse to perform any other duty enjoined upon it for which a penalty has not herein been provided, for every such act of violation it shall pay the state of Texas a penalty of not more than five thousand dollars.

Sec. 19. All of the penalties herein provided, except as provided in section 17, shall be recovered and suits thereon shall be brought in the name of the State of Texas in the proper court having jurisdiction thereof in Travis County * * * by the Attorney General or under his direction; and the attorney bringing such suit shall receive a fee of fifty dollars for each penalty recovered and collected, by him, and ten per cent. of the amount collected, to be paid by the state. * * * All fines and penalties recovered by the state under this act shall be paid into the treasury of the State.

Sec. 21. It is hereby made the duty of such Railroad Commission to see that the provisions of this act and all laws of this State concerning railroads are enforced and obeyed, and that violations thereof are promptly prosecuted, and penalties due the State therefor are recovered and collected. And said commission shall report all such violations with the facts in their possession to the Attorney General or any other officer charged with the enforcement of the laws, and request him to institute the proper proceedings; * * *

(a) It shall be the duty of the commission to investigate

all complaints against railroad companies subject hereto and to enforce all laws of this State in reference to railroads."

Section 1113, of the Revisal of North Carolina, provides that the commission, whenever in its judgment any corporation has violated any law, shall first give notice of such violation to the offending corporation, and in the event of a failure on the part of such corporation to comply with the law, "shall forthwith present the facts to the Attorney General, who shall take such proceedings thereon as he may deem expedient."

This provision is positive and must be construed as being mandatory. In this case the statute of North Carolina makes it clearly the duty of the Attorney General, when called upon, to prosecute any suit or action which may be deemed necessary to secure the enforcement of the laws of the State, in regard to the fixing of maximum rates. This section when construed in accordance with the rule laid down in the Reagan and Ames cases clearly charges the Attorney General with a duty in relation to the enforcement of the act in question.

In this connection it is well to consider the scope and meaning of the expression "specially charged with the execution of a state enactment." The Supreme Court in the Reagan case as well as the Ames case expressly held that the officers enjoined in those cases were state officers "specially charged with the execution of a state enactment." From what appears in those cases, it necessarily follows, that the words "specially charged" are not to be construed to mean that the Attorney General cannot be enjoined except in cases where the state statute has expressly commanded him to enforce the act by bringing suits for penalties or prosecuting misdemeanors mentioned in the act. He was only charged by his general duty as the law officer of the State and yet he was enjoined in language so broad as to include every attempt to enforce the penalties attending the violation of "House Roll 33."

In the Reagan case the Attorney General was not deprived of his discretion and reduced to a mere ministerial agent, as will appear by an examination of the Texas statute.

Likewise, an examination of the Nebraska statute of 1887 and the re-enactment of it into the Revised Statutes of Nebraska of 1893, chapter 72, Article 8, sections 1 to 23 fails to show that the Nebraska State Board of Transpor-

tation was in any way directed to enforce by criminal procedure the act of 1887 or any other act. It was held in that case that the Attorney General of Nebraska was specially charged with the enforcement of the penal clause of the act of 1893, relating to the maximum rate law known as "House Roll 33" merely because the law of 1893 imposed a penalty for the violation of the maximum rate law.

When we come to consider the statutes of North Carolina we find, to construe the same in accordance with the principles laid down in the Reagan case, Smyth *v.* Ames, Consolidated Gas Company *v.* Mayer, that the Corporation Commission and the Attorney General of North Carolina are specially charged with the enforcement of the acts of 1907.

It is inconceivable that a Circuit Court of the United States, in the exercise of its jurisdiction, should be powerless to afford a remedy to one who seeks to assert a right which is guaranteed by the Constitution of the United States. This is in no sense a suit against the state, nor can it be successfully contended that the state is in anywise a party in interest, in so far as the merits of the controversy are concerned. It cannot be reasonably insisted that this is a suit to prevent the state from enforcing any right which it possesses, nor can it be said to be a suit to compel the performance of an obligation of the state, nor does it in anywise involve a matter in which the state has a pecuniary interest; the parties in interest being, the complainant on the one side, and the travelling public on the other. Therefore, the questions presented are not such as to warrant the assumption that this court is without jurisdiction, and a careful study of the circumstances attending the adoption of the Eleventh Amendment, as well as the end to be obtained by the adoption of the same, show conclusively that those who were responsible for its adoption never dreamed that it could be used as a means of depriving an American citizen of a substantial right conferred upon him by the Constitution of the United States. The Eleventh Amendment, being a part of the Constitution of the United States, must be construed so as to give full force and effect to each and every provision of the instrument of which it forms a part. Any other construction of this Amendment would practically nullify that clause of the Constitution which provides that no state shall pass any laws impairing the obligation of con-

tracts, as well as the Fourteenth Amendment which, among other things, provides that "no state shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It cannot be that a state legislature can so frame an act as to deprive a citizen of a right vouchsafed to him by the Constitution of the United States, and it is equally unreasonable to contend that, a state legislature possesses the power by legislative enactment, to deprive this court of its jurisdiction, and the sooner these questions are definitely determined the better it will be for all parties concerned.

That there is a disposition on the part of some to do that, which, if successful, would not only impair the usefulness of the Federal Courts, but nullify certain provisions of the Constitution, is apparent. This situation is preductive of a feeling of unrest and a lack of confidence on the part of the people in the ability of the United States courts to fairly administer the law in accordance with the Constitution of the United States.

For the reasons stated, the court is of opinion that this is not a suit against the state within the meaning of the Eleventh Amendment, and that, therefore it has jurisdiction to hear and determine the isues raised by the pleadings.

It is charged in the bill that if the proposed rates are enforced complainant will suffer irreparable injury; that such rates are unreasonable, unjust and confiscatory and that the complainant is about to be deprived of its property without due process of law, and as a means of having its rights determined in an orderly and judicial way it comes into a court of equity and asks that an order be granted restraining the enforcement of the provisions of the act of 1907 until the final hearing of the cause.

The complainant insists that it should be protected against the irreparable injury it would sustain if the proposed rates should be put into effect pending the final hearing of the original suit in this cause. Among other things, it is alleged that, the legislature of North Carolina at its recent session passed acts regulating freight and passenger rates and that by virtue of the provisions of said acts it is about to be deprived of its property without due process of law and also

denied the equal protection of the laws. The complainant seeks to enjoin the enforcement of the rates prescribed by the act in question upon the ground that the statute prescribing the same is repugnant to the Constitution of the United States. It is contended that the lapse of any considerable length of time would expose it to innumerable suits by shippers and the travelling public for penalties, as well as subject it to the penalties prescribed by the statute. Complainant prays for an injunction against the Corporation Commissioners, the Attorney General and the Assistant Attorney General during the pendency of this cause.

On the 8th day of May, 1907, an order was entered restraining the defendants from enforcing the aforesaid act and at that time notice was issued to the defendants to appear before me on the 28th day of June, 1907, and show cause why the injunction thus granted, should not be continued until the final hearing.

In considering this motion it is incumbent upon the court, in the exercise of its discretion, to determine whether, under the circumstances, the complainant is entitled to the relief which it seeks, and also whether it will suffer irreparable injury in the event the court should refuse to continue the injunction until the final hearing.

That it is the duty of a court of equity to restrain the enforcement of an act which is alleged to be unconstitutional, when it is shown by the proof that the complainant will, pending a final hearing, suffer irreparable injury is a well established rule of such courts. In such cases, the court in order to avoid a multiplicity of suits, will restrain the enforcement of any act with respect to the same until the final hearing.

In discussing this phase of the question, the learned Justice who delivered the opinion in the case of Smyth *v.* Ames, *supra*, said:

"In these cases the plaintiffs, stockholders in the corporations named, ask a decree enjoining the enforcement of certain rates for transportation upon the ground that the statute prescribing them is repugnant to the Constitution of the United States. Under the principles which in the Federal system distinguish cases in law from those in equity, the Circuit Court of the United States, sitting in equity, can make a comprehensive decree covering the whole ground of controversy and thus avoid the multiplicity of suits that

would inevitably arise under the statute. The carrier is made liable, not only to individual persons for every act, matter, or thing prohibited by the statute, and for every omission to do any act, matter, or thing required to be done, but a fine of from one thousand to five thousand dollars for the first offense, from five thousand to ten thousand dollars for the second offence, from ten thousand to twenty thousand dollars for the third offence, and twenty-five thousand dollars for every subsequent offence. The transactions along the line of any one of these railroads, out of which causes of action might arise under the statute, are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree, according to the prayer of the bills, would avoid a multiplicity of suits, and give a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law; for a court of law could only deal with each separate transaction involving the rates to be charged for transportation. The transactions of a single week would expose any company questioning the validity of the statute, to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency and determine, once for all and without a multiplicity of suits, matters that affect, not simply individuals, but the interests of the entire community as involved in the use of a public highway and in the administration of the affairs of the quasi public corporation by which such highway is maintained."

It is well to remember that the allegations in the bill filed by complainant are in many respects similar to those contained in the bill filed in that case.

In the case at bar it is shown that section four of the act, prescribes heavy and unusual penalties, the enforcement of which, for any considerable length of time in a court of law would practically bankrupt the complainant.

In addition to the allegations contained in the verified bill, the complainant has offered the affidavit of A. H. Plant, comptroller of complainant, as to the amount of its intrastate, as contradistinguished from its inter-state, business.

Among other things, Mr. Plant, says:

"That he is, and for some years past has been, comptroller of the Southern Railway Company, and as such has supervision over its accounts, and charge of its books, and that

the following is a true statement of the results of operation of Southern Railway Company in North Carolina during the year ending June 30, 1906, under the rates and classifications existing at that time:

Gross earnings from operation in North Carolina, including both interstate and intrastate	$12,043,727.13
Operating cost to earn one dollar of intrastate revenue in North Carolina was not less than	86.35¢

While it is impossible to state the exact cost to earn a dollar of intra-state revenue, it is certain that it costs much more than the average cost to do all business, and at least the above mentioned figures, as this affiant verily believes.

Gross earnings in North Carolina from intra-state traffic:

From passengers	$1,565,695.33
From freight	1,322,564.30
From mail	230,383.78
From express	169,474.89
From miscellaneous	36,507.44
Total gross revenue from intrastate traffic in North Carolina for said year	3,324,625.74
Minimum expense of earning this gross intrastate revenue, on the basis of 86.35¢ to earn one dollar	2,870,814.33
Maximum net earnings from intrastate traffic in North Carolina for said year, without allowing for taxes	453,811.41
Taxes chargeable to North Carolina for the fiscal year ended June 30, 1906, were	269,651.18
The proportion of intrastate gross earnings to total gross earnings in North Carolina was 27.60 per cent.	
27.60 per cent. of the total taxes above mentioned which should be charged to intrastate traffic shows intrastate taxes to have been for that year	74,423.73
Improvements and betterments not capitalized chargeable to North Carolina during the year for the purpose of keeping the property up to modern standard and without additions to it, amounted to	197,945.81

27.60 per cent. of which is assignable to intrastate traffic, or.....	$54,633.04
Total taxes and improvements and betterments not capitalized chargeable against intrastate traffic for said year.....	129,056.77
Leaving as the maximum net intrastate earnings in North Carolina for said year, after deducting the said proportion of taxes and the said proportion of improvements and betterments not capitalized.....	324,754.64
Applying to the above mentioned intrastate business in North Carolina for the year ended June 30, 1906, the passenger and freight rates proposed by the acts of the legislature of North Carolina passed during March of the current year, there would have been a loss of passenger revenue of .	275,055.53
And a loss in freight revenue of.....	21,691.64
Or a total of.....	296,747.17
Making the net earnings from intrastate operations under the proposed rates and classifications	28,007.47
During the said year the value of the physical properties of this company in North Carolina, according to the assessment made by the state for the purpose of taxation, was	26,134,865.00
The proportion of this tax value used for intrastate purposes should be ascertained on the basis of user, which is on the basis of the proportion of gross earnings from intrastate business to the total gross earnings from all business for said year in North Carolina, or 27.60 per cent. of the said assessed value, which amounts to.....	7,213,222.74
The maximum net revenue from intrastate traffic in North Carolina under the existing rates would only yield as interest upon said proportion of said tax value, per annum, 4.50 per cent.	
Under the proposed rates and classifications the net revenue from intrastate traffic in North Carolina would only yield as interest upon the said proportion of said tax value, per annum, .39 per cent.	

The affiant further says that the foregoing results of operation in the State of North Carolina for the year ended June 30, 1906, show a larger net result to the company than is fairly representative of the results of the company's operations in the future, for the reason that since the 30th day of June, 1906, the close of said fiscal year, there has been a large increase in the expenses of the company, due to increases in wages, and to the increase in cost of all material and supplies and other expenses, as will be shown by the following statement for the system:

For six months ended December 31, 1906, the gross earnings of the company increased over the same period of the previous year.....	$1,711,861.79
Whereas the operating expenses and taxes increased for the same period.....	2,623,979.77
Showing a decrease in net earnings for the six months mentioned, of.....	912,117.98

In addition to the foregoing increases in wages and other expenses, the company is confronted with still further very substantial demands for increases in wages. While the above figures are for the system, a proportionate part of said increase in expenses would apply to North Carolina."

It is insisted by counsel for defendants that Mr. Plant made certain reports to the Corporation Commission which are inconsistent with the affidavit which he now makes as to local business transacted by complainant in the State of North Carolina. In an affidavit filed by Mr. Plant on the 26th of June, 1907, in referring to the reports which he had previously made to the Corporation Commission, it is said:

"As no account of the difference in such costs was kept upon the books of this company and no attempt made in the company's books to separate the cost between the inter-state and the intra-state business, when called upon for statements of these expenses by the North Carolina Commission, such statements were necessarily made upon an assumed basis, with the statement that the results were approximate. And the basis assumed for these reports in North Carolina was the minimum amount stated in the decision above referred to of the Supreme Court of the United

States in Smyth *v.* Ames, 169 U. S. Subsequent investigation and study of the situation and consultation with men of experience have convinced me that the estimated basis made in the report to the commission in North Carolina is entirely too small, and that the minimum should not be less than is given in this affidavit. In fact, when all the conditions are considered and all the elements of increased expenses are given their due weight, I believe that the estimate given in this affidavit will be considerably below what is the real cost of doing such business. It is impossible to arrive at such costs accurately, as there are many of the elements of the expense which are common to all classes of business, and a division of expenses thus common to all classes of traffic must be made more or less upon arbitrary lines. For example: The general expense of doing all the business of the company cannot, with accuracy, be allocated as between the different classes of business, and the same is true of other elements of expense, such as maintenance; but it is safe to say that a reliable minimum can be reached, and this minimum is not, in my judgment, after much consideration of the subject, less than that above mentioned. This estimate of a minimum makes no allowance whatever for any increased cost of maintenance due to the increased wear and tear on the road bed and equipment incident to the more frequent starts and stops in connection with intra-state business. * * *

"The earnings from passengers of passenger trains in North Carolina embracing both inter-state and intra-state passenger business, are less than one dollar per train mile, and it is the usually accepted opinion among railroad men that a passenger train which does not earn from its passengers more than a dollar per mile is not a profitable train, the general impression being that a passenger train earning less than one dollar per train mile from passengers is run at a loss. Whether this is actually true or not, I believe it to be certain that it costs to earn a dollar of every class of passenger train revenue, intra-state as well as inter-state, more than the above mentioned figures of 86.35 cents."

When we come to consider the testimony of Mr. Plant we find that it is true that he made certain reports to the Corporation Commission which are not strictly in accord with the affidavits which he now makes. While this is so, it is also shown by the marginal notes of the reports of the

corporation commission, that the same were based only on an estimate and were not intended to be treated as matters of fact. If it had been shown that the witness had made two contradictory statements or inconsistent utterances as to matters of fact, then the question as to the veracity of the witness would arise, and under such circumstances, it would be the duty of the court to consider the same in determining the weight of such testimony as bearing upon the truth or falsity of the same, but inasmuch as these statements relate solely to a matter of opinion, no question of veracity arises, and when we consider the statements in question, together with the evidence of Mr. Plant, it cannot be said that the testimony which he now gives is calculated to impeach his character as a witness, nor can it be said that, such testimony tends to contradict (in the ordinary acceptation of the term), the statements which he made to the corporation commission in the first instance. The one is a matter of opinion—an estimate—and may vary with the conditions of one's study and investigation, and his opinion is valuable in proportion to the amount of study and investigation that he may make with respect to the matter about which he is testifying. While on the other hand, if he makes a contradictory statement as to a question of fact, such statement may be used for the purpose of discrediting him as a witness.

Our experience in human affairs teaches us, that, in matters of opinion men are likely to differ materially, and such difference does not tend in the slightest degree to affect the character of one who may have given expression to conflicting opinion at different stages of an investigation of a subject, the determination of which necessarily involves calculations that are based upon estimates, and which do not depend upon facts to support the same.

The testimony of Mr. Plant, is in the main, sustained by the testimony of the following persons who have filed affidavits in this cause: Frank Ney, general auditor Rock Island Railroad Co.; Erastus Young, general auditor, Union Pacific R. Co.; Mr. Krebs, general auditor, Illinois Central Railroad Co.; H. B. Spencer, Vice-president of complainant company; Mr. Earling, vice-president of the Chicago, Milwaukee & St. Paul R. Co.; Mr. Truesdale, President Del. & L. R. Co.; Mr. Harris, President C., B. & Q. R. Co.; Mr. Wickersham, president of the Atlantic & West Point R. Co.; Mr. Sullivan, comptroller C. & O. R. Co.

It is also shown by the affidavit of W. H. Tayloe, general passenger agent of complainant, that the rates now in force are the same which were in force during the whole of the year ended June 30, 1906, and that in no instance, are such rates unjustly, unreasonably, and unfairly high, and that in no instance are such rates greater than a reasonable compensation for the services rendered. Mr. Tayloe also states that the passenger tariff established by the act in question is unjustly, unreasonably, and unfairly low, and that the rates therein prescribed would not furnish the complainant a fair, just or reasonable compensation for the services rendered, or a reasonable or fair return on its property engaged in intra-state business. That if the rates so established are put into effect the revenue of complainant will be largely reduced and there would not be a sufficient increase in passenger business to compensate the complainant for the loss of revenue resulting therefrom.

It is also insisted by counsel for complainant that in the case of Smyth *v.* Ames, *supra*, it was shown that the evidence justified twenty per cent. higher as the proper basis, and that in the case of Chicago, Mil. & St. P. R. Co. *v.* Tompkins, 176 U. S. the contention of Mr. Plant is sustained.

In the case of Smyth *v.* Ames, *supra*, the Supreme Court in referring to methods similar to those employed by Mr. Plant and other witnesses in this cause, said:

"The conclusion reached by the Circuit Court was that the reduction made by the Nebraska statute in the rates for local freight was so unjust and unreasonable as to require a decree staying the enforcement of such rates against the companies named in the bill. Ames *v.* Union Pacific Railway Company, 64 Fed. Rep. 165, 189. That conclusion was based largely upon the figures presented by Mr. Dilworth, while he was secretary of the State Board of Transportation, as well as a defendant and one of the solicitors of the defendants in these causes. He was a principal witness for the Board. His general fairness and his competency to speak of the facts upon which the question before us depends are apparent on the record. He stated that the average reduction made by the statute on all the 'commodities of local rates' was 29.50 per cent.; and this estimate seems to have been accepted by the parties as correct. He estimated that the percentage of operating expenses on local business would exceed the percentage of operating expenses

on all business by at least ten per cent., and that it might go as high as twenty per cent. or higher. And this view is more than sustained by the evidence of witnesses possessing special knowledge of railroad transportation and of the cost of doing local business as compared with what is called through business. Indeed, one of those witnesses states that the cost of carrying local freight is four times as much as the cost of through freight per ton per mile; another, that the cost of the short haul is 'reasonably double the long haul.' If due regard be had to the testimony—and we have no other basis for our judgment—we are not permitted to place the extra cost of local business at less than ten per cent. greater than the percentage of the cost of all business."

Counsel for defendants offer no evidence to contradict the testimony produced by the complainant, save the report herein referred to as having been made by Mr. Plant to the Corporation Commission.

It is charged in the bill that the present rates were established with the approval of the corporation commission of North Carolina and this allegation is uncontradicted. This circumstance, taken in connection with the fact that the corporation commission had before it the reports made by Mr. Plant as to the amount of complainant's intra-state business, at the time the present rates were adopted, is worthy of consideration in determining the merits of this controversy, inasmuch as it appears that at the time the present rates were established *it was the judgment of the corporation commission that a general reduction of rates could not be made without injury to complainant*, and the court is unable to find anything from the record before it to show that the situation in North Carolina has so changed since that date as to justify a change of the rates which were deemed expedient at that time.

The issue thus raised, when stripped of irrelevant and extraneous matter, presents solely the question, as to whether the rates fixed by the legislature are unjustifiably and unreasonably low in view of the amount of money invested by complainant in such intra-state business, as well as the cost of operating its lines of road, together with the necessary expenses incurred in connection therewith, which are not, technically speaking, operating expenses, yet at the same time, should be considered in determining the reasonableness of the rates as being necessarily pertinent thereto. In

addition to these items, should be considered taxes and payments on account of casualties and accidents.

The unprecedented development and prosperity of the South at this time, necessitate double tracking as well as a general overhauling of the property of complainant, in order that it may be able to meet the demands thus occasioned. There has never been a period in the history of that section of the country when there was such an urgent demand for improved and increased railroad facilities as at the present time.

What the public demands at this time is increased facilities in the way of transportation of freight and passengers, and this is especially true in Western Carolina, a section of country which until 1881 was practically without railroad facilities. The development of the timber and mineral interests of this section since the completion of the Southern Railway, renders it highly important that we should not only have better railroad facilities, but in addition thereto, new lines of road constructed in order that the people of that section may be able to develop their properties. As a result of this development, it is to be presumed that there has been a large increase in the value of the real estate in that section of the country, which alone, inures to the benefit of the people of such territory.

It is no ordinary task to construct and operate a railroad in a mountainous region like that of Western Carolina. Some of these matters at this stage of the proceeding are pertinent to the questions at issue, and are worthy of consideration.

Much has been said by counsel for defendants, in regard to state sovereignty, and newspapers and state officials have undertaken to determine those questions by methods unknown to judicial procedure, and which, if permitted to prevail, would lead to demoralization of public and private business and would be in utter disregard of the rights of individuals as guaranteed by the Constitution of the United States.

In the famous case of Marbury *v.* Madison, Mr. Chief Justice Marshall, among other things, said:

"The government of the United States has been emphatically termed a government of laws, and not men. It will certainly cease to deserve this high appellation, if the

laws furnish no remedy for the violation of a vested legal right. * * *"

It can never be truthfully said that there is an interference with States' rights so long as the courts of the United States do no more than exercise the judicial power conferred upon such courts by Congress in pursuance of the constitution of the United States.

It is remarkable that any one should at this late day question the power of the courts to declare an act of a state or Federal legislature unconstitutional, when it is shown that it is repugnant to the Constitution; and it is well to remember that a North Carolina court was the first to announce the doctrine that the courts possessed such power, and soon thereafter the Supreme Court of the United States, in the case of Marbury *v.* Madison, *supra,* declared it to be the settled doctrine of this country.

In the North Carolina case, the Court of Conference (which was the highest court at that time), in Bayard *v.* Singleton, 1 N. C. Rep. 5 (Nov. Term, 1787), in discussing the power of the court to declare an act of the legislature unconstitutional, said:

"Another mode was proposed for putting the matter in controversy on a more constitutional footing for a decision, than that of the motion under the aforesaid act. The Court then, after every reasonable endeavor had been used in vain for avoiding a disagreeable difference between the legislature and the judicial powers of the State, at length with much apparent reluctance, but with great deliberation and firmness, gave their opinion separately, but unanimously, for overruling the afore-mentioned motion for the dismission of the said suits.

"In the course of which the judges observed that the obligation of their oaths and the duty of their office required them, in that situation, to give their opinion on that important and momentous subject; and that notwithstanding the great reluctance they might feel against involving themselves in a dispute with the legislature of the State, yet no object of concern or respect could come in competition or authorize them to dispense with the duty they owed the public, in consequence of the trust they were invested with under the solemnity of their oaths.

"That they therefore were bound to declare that they considered that whatever disabilities the persons under whom

the plaintiffs were said to derive their title, might justly have incurred against their maintaining or prosecuting any suits in the courts of this State, yet that such disabilities in their nature were merely personal, and not by any means capable of being transferred to the present plaintiffs, either by descent or purchase; and that these plaintiffs being citizens of one of the United States, or citizens of this State, by the confederation of all the states, which is to be taken as a part of the law of the land, unrepealable by any act of the general assembly.

"That by the Constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For that if the legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die without the formality of any trial at all. That if the members of the general assembly could do this, they might with equal authority not only render themselves the legislators of the State for life, without any further election of the people, but from thence transmit the dignity and authority of legislation down to their heirs male forever.

"But that it was clear that no act they could pass could by any means repeal or alter the constitution, because if they could do this, they would at the same instant of time destroy their own existence as a legislature, and dissolve the government thereby established.

"Consequently the Constitution (which the judicial power was bound to take notice of as much as of any other law whatever), standing in full force as the fundamental law of the land, notwithstanding the act on which the present motion was grounded, the same act must, of course, in that instance, stand as abrogated and without any effect."

That the legislature has the power within the limitations fixed by the Constitution of the United States to prescribe maximum rates for railroads, cannot be denied. While this is so, it is equally true as was said by Judge Catron (afterwards a justice of the Supreme Court of the United States), in the case of Vanzant *v.* Waddell, 2 Yerger, 262-70:

"Every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing

by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another."

In the case of Smyth *v.* Ames, *supra,* in referring to this phase of the question, it is said:

* * * "But despite the difficulties that confessedly attend the proper solution of such questions, the court cannot shrink from the duty to determine whether it be true, as alleged, that the Nebraska statute invades or destroys rights secured by the supreme law of the land. No one, we take it, will contend that a state enactment is in harmony with that law simply because the legislature of the State has declared such to be the case; for that would make the State legislature the final judge of the validity of its enactments, although the Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding. Art. 6. The idea that any legislature, state or federal, can conclusively determine for the people and for the court that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law is in opposition to the theory of our institutions. The duty rests upon all courts, federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

The complainant has invoked the jurisdiction of this court for the purpose of asserting a right which is guaranteed to it by the organic law of the land. This law is supreme and should be obeyed until the people of the United States through their legislatures shall deem it expedient to modify the same. Every official, state or federal, is required before entering upon the discharge of the duties of his office to take an oath to support and maintain the Constitution of the United States and the laws made in pursuance thereof,

and the state official who takes this oath, among other things, is required to state that he will support the constitution and laws of the state not inconsistent with the Constitution and laws of the United States. Under these circumstances, there can, and should be, no conflict between the state and federal courts.

If this were a suit in the state court and it should appear, as it does in this case, that the complainant was threatened with irreparable injury, the injunction would be continued until the final hearing as a matter of course, upon the theory that it is the duty of the court to preserve the *status quo* until there could be a final determination of the questions involved in the controversy. This is the well settled rule of the federal courts and is the universal practice in the state courts of North Carolina.

Counsel for defendants cite the case of Covington, &c., Co. *v.* Sanford, 164 U. S., 578. The court has carefully considered that case and is of opinion that it does not apply to the case at bar. Counsel also referred to the San Diego case, 174 U. S., as showing that the railroad company must show "beyond all doubt" that the rates complained of were confiscatory. This expression in the San Diego case refers to the rule by which the court should be governed on a final hearing, and has no reference to a hearing on a preliminary motion for an injunction to preserve the *status quo*. It was also established in that case that the rates complained of would admit of a return of six per cent. upon the value of the property.

While this court, sitting as a court of equity, possesses ample power to restrain the enforcement of an act of the legislature in a proceeding of this character, pending a final hearing, it should be borne in mind that the legislation of North Carolina relating to railroads and the fixing of rates for the same, contemplates that injunctions should be granted in cases like that under consideration, and the necessary means are provided by which the interests of the patrons of the road may be fully protected in such cases, in so far as freight rates are concerned.

It is provided under Sub-head B., "Injunctions, When Granted," Section 1082, as follows:

"No judge shall grant an injunction, restraining order or other process staying or affecting, during the pending of any appeal, the enforcement of any determination of the

corporation commission fixing rates or fares, without requiring as a condition precedent the executing and filing with the corporation commission of a justified undertaking in the sum of not less than twenty-five thousand dollars for any company whose road is of less length than fifty miles, and fifty thousand dollars for any company whose road is over fifty miles in length, conditioned that the company will make and file with the corporation commission a sworn statement every three months during the pending of the appeal of the items of freight, with names of shippers, carried over such company's road within the preceding ninety days, showing the freights charged and those fixed by the corporation commission; and in the event that the determination of the corporation commission appealed from is affirmed in part or in whole such company shall within thirty days pay into the treasury of North Carolina the aggregate difference between the freights collected and those fixed by the final determination of the matter appealed. (1899, c. 164, s. 7)."

The foregoing provision clearly indicates that it was the purpose of the legislature not to interfere with the remedy by injunction in cases where it might appear that the rates fixed were confiscatory in their character, and the only limitation with respect to the same is the provision that in cases where it is sought to restrain an act fixing freight rates that a bond should be required. (It may be that the State officials have overlooked this provision).

Under these circumstances, the court in addition to being required by the rules, practice and procedure in such causes to preserve the *status quo* pending the hearing, is admonished by the acts of the legislature that in all such cases, where it appears that complainant is about to suffer irreparable injury, that it is the policy of the law of North Carolina to restrain the enforcement of such legislation pending the hearing upon giving ample security for the payment of such sums as may be deemed to be necessary to protect the rights of those affected by the rates established.

While this provision of the North Carolina law affords ample provision for the protection of shippers of freight pending the final hearing, the statute is silent as to the traveling public, and while it is contemplated that the enforcement of any act fixing passenger rates may be restrained,

nevertheless the legislature in its wisdom did not deem it necessary to make any provision for protection of those whose rights might be affected in this respect by the granting of a temporary injunction. Thus it is clearly shown that it is not the policy of the legislature of North Carolina to go to the extent which the Federal courts have gone in such causes (notably in the case of Consolidated Gas Co. *v.* Mayer, 146 Fed. Rep.), in protecting the rights of the traveling public.

The allegations of the bill, which are supported by uncontradicted evidence, clearly show that if the present rates are permitted to be enforced, the complainant will suffer great and irreparable injury in the event that the act in question should ultimately be declared unconstitutional. And in such event, the difference between the proposed rate and the present rate would be a clear loss to the complainant, inasmuch as it would be impracticable for it to bring a suit to recover the difference between the proposed rate and the old rate against each individual who might in the meantime purchase a ticket, and the denial at this time of the remedy universally afforded by courts of equity, under such circumstances, would be to deprive complainant of a right guaranteed to it by the Constitution of the United States.

While a railroad is not entitled to earn a profit on every mile of its road, nor upon every article carried by it, nevertheless it is entitled to earn a reasonable profit upon the entire intra-state business in the State.

It is shown by the evidence that the gross revenue from intra-state business in North Carolina in 1906 was $3,324,625. It is also shown that the minimum expense of earning this amount should be on the basis of 86.35 cents on one dollar earned and the aggregate expense thus incurred would be $2,870,814.33; that the maximum net earnings from intra-state business in North Carolina, not making any allowance for taxes is $453,811.41; that the taxes chargeable to North Carolina for the fiscal year ending June 30, 1906, was $269,651.18; that the proportion of intra-state gross earnings to total gross earnings was 27.60 per cent.; that 27.60 per cent. of the total taxes which should be charged to intra-state traffic shows that the intra-state taxes should have been for that year $74,423.73; improvements and betterments not capitalized chargeable to North Carolina for the same year

for the purpose of keeping the property up to modern standard and without additions to it amounted to $197,056.77; 27.60 per cent. of this last item which is assignable to intrastate traffic is $54,633.04; thus making a total of taxes, improvements and betterments not capitalized, chargeable against intra-state traffic for said year, $129,056.77.

The evidence shows that the complainant will sustain a loss of revenue by the proposed passenger rates of $275,055.53, a net loss from freight of $21,691.64, making a total loss of $296,747.17. So it will be seen from the foregoing that the net earnings from intra-state operations under the proposed rates and classifications would only be $28,007.47.

That part of the complainant's property in North Carolina devoted to intra-state business was assessed for taxation in that State during the year ended June 30, 1906, at $7,213,222.74. In this connection it should be remembered that no class of property in North Carolina is assessed at its true value for taxation. Nevertheless, if we assume that the tax valuation of the property of complainant to be a proper method of ascertaining the value of its property chargeable to intrastate business, we find that the net earnings of complainant, under the proposed rates and charges for intrastate business, taking the year 1906 as a basis, would only amount to thirty-nine one-hundredths of one per cent. upon such valuation, before allowing anything for the payment of dividends upon the stock and interest on the bonds of complainant.

The complainant in this cause occupies a fiduciary relation to the holders of its mortgages, stocks and bonds. The holders of these investments and securities are as much entitled to the protection of the law as any private citizen who may have invested his money in the mercantile business or any other private enterprise. To hold otherwise, would be to discourage investments in those public enterprises which are indispensable to the development, progress and growth of the country. If it is to be held by the courts that those who invest their capital in public enterprises of this kind are to be denied the equal protection of the laws, then the construction of railroads and other public utilities by private capital would at once cease, and the government would be required to embark in the untried, if not hazardous undertaking, of owning and controlling, not only the rail-

roads of the country, but any other utilities which might be deemed necessary for the convenience and advantage of the public.

North Carolina has had a sad experience in attempting to operate railroads within her borders, and her efforts in that respect have proven disastrous in the extreme, and today, the only railroad property owned by the State is being operated under leases which are deemed to be much more advantageous to the State than any plan of operation which it could adopt under its own management and control.

The State of North Carolina undertook to construct and operate the Western Carolina railroad, but its efforts proved to be a dismal failure, and had it not been for the purchase of the same by the complainant, in all probability, it would never have been completed, and today, Western Carolina would be inaccessible to the outside world.

The court does not deem it proper at this time, to pass upon the validity of section one of the act relating to passenger rates, feeling as it does, that the cause should be referred to a master in order that all the facts bearing upon that question should be ascertained and reported by him, before a final determination as to the reasonableness of the rates imposed can be had.

Much has been said by counsel as to the power of the court in this cause to grant a temporary restraining order, as well as the expediency of the same.

There can be no doubt as to the true rule by which the court is to be governed when it appears that the complainant is about to suffer irreparable injury. In this instance, the act in question is challenged as being unconstitutional, and as the court has said, the evidence now before it is sufficient to justify it in continuing the order heretofore granted, until the final hearing. However, the court is not bound by this strict rule of construction in dealing with this question. In the case of Cotting *v.* Kansas City Stock Yards Company, 183 U. S. 83, Circuit Judge Thayer, who heard the case below, decided that the act in question was valid, and notwithstanding that the court in that case was of opinion that the act was constitutional and dismissed the bill, nevertheless, the learned judge granted an order restraining the enforcement of the act of the legislature until the matter could be determined by the Supreme Court. That por-

tion of the order embodied as a part of the final decree is as follows:

"The great importance of the questions involved in these cases will doubtless occasion an appeal to the Supreme Court of the United States, where they will be finally settled and determined. If, on such appeal, the Kansas statute complained of should be adjudged invalid for any reason, and in the meantime the statutory schedule of rates should be enforced, the stock yards company would sustain a great and irreparable loss. Under such circumstances, as was said in substance by the Supreme Court in Hovey *v.* McDonald, 109 U. S. 150, 161, it is the right and duty of the trial court to maintain, if possible, the *status quo* pending an appeal, if the questions at issue are involved in doubt; and Equity Rule 93 was enacted in recognition of that right. The court is of opinion that the cases at bar are of such moment and the questions at issue so balanced with doubt, as to justify and require an exercise of the power in question. Therefore, although the bills will be dismissed, yet an order will at the same time be entered restoring and continuing in force the injunction which was heretofore granted for the term of ten days, and if in the meantime an appeal shall be taken, such injunction will be continued in force until the appeal is heard and determined in the Supreme Court of the United States; provided that, in addition to the ordinary appeal bond, the Kansas City Stock Yards Company shall make and file in this court its bond in the penal sum of two hundred thousand dollars payable to the clerk of this court and his successors in office, for the benefit of whom it may concern, conditioned that in the event the decree dismissing the bills is affirmed, it will, on demand, pay to the party or parties entitled thereto all overcharges for yarding and feeding live stock at its stock yards in Kansas City, Kansas, and Kansas City, Missouri, which, it may have exacted in violation of sections four and five of the Kansas statute relative to stock yards, approved March 3, 1897, since an injunction was first awarded herein, to-wit, on April —, 1897; and that it will in like manner pay such overcharges, if any, as it may continue to exact in violation of said statute during the pendency of the appeal. * * *"

Thus it will be seen that in that instance, notwithstanding the fact that the circuit judge was of opinion that the statute challenged was valid, yet, in the exercise of his dis-

cretion, an order was made restraining the enforcement of the statute until there could be a final hearing of the same by the Supreme Court.

The action of Judge Thayer, in that case, affords a striking illustration as to the extent to which a court of equity will go in order to preserve the *status quo* and thus prevent irreparable injury in a cause where it has assumed jurisdiction. The Supreme Court held that Judge Thayer's action in continuing the restraining order, under the circumstances, was proper, and Mr. Justice Brewer, who delivered the opinion of the court, in referring to the action of the lower court, said:

"The learned circuit judge, in deciding the case, appreciated the importance of the questions involved, and although denying the relief sought by the plaintiffs, exercised his power of continuing the restraining order until such time as these questions could be determined."

It should be observed that the learned justice concedes to the Circuit Court the power to continue the restraining order until the questions involved could be determined. And the reasons for continuing the restraining order in the case at bar are much stronger than those which induced Judge Thayer to restrain the enforcement of the act in that case pending the final determination of the same by the Supreme Court.

Notwithstanding the fact that the court had at the hearing of this motion, considered section 4 of the rate act of 1907, and was of opinion that the same was unconstitutional; yet, during the preparation of this opinion, and before the court had expressed its views in respect to the same, it was called upon to determine the validity of that section in the case of *In re* Jas. H. Wood, and after carefully considering the same, reached the conclusion that the said section was on its face unconstitutional and void.

Inasmuch as the allegations of the bill, supported by the evidence, show that, unless the restraining order heretofore granted is continued until the final hearing, the complainant will suffer great and irreparable injury, in the event the act in question should be finally declared invalid, the court is of opinion, that such order should be continued until the final hearing; and in order that the traveling public may be fully protected in the event that the act should be ultimately declared to be valid, the complainant

will be required to give ample bond to secure the payment of a sufficient sum into the registry of the court to reimburse those who may purchase tickets of complainant in the meantime, a sum equal to the difference between the present rate and the proposed rate.

NOTE.

Subsequent to the granting of an order continuing the interlocutory injunction until the final hearing, to-wit, on the 29th day of July, 1907, the complainant through its counsel filed a petition asking a modification of the interlocutory injunction to the extent of permitting it to put in operation a two and one-quarter cent rate in accordance with the provisions of the act passed by the legislature of North Carolina.

It is stated in the petition substantially that the governor of the State had threatened to institute proceedings in the State court for the purpose of annulling the lease of the North Carolina Railroad Company and also to call a special session of the legislature with the view of securing the passage of additional legislation affecting the rights of the complainant; that a number of suits had been instituted in the State courts against complainant and its agents on account of its having complied with the terms of the decree of this court granting an interlocutory injunction; that the governor of the State had issued a circular letter to the Superior Court judges of the State, advising them that it was their duty to see that all parties who failed to comply with the provisions of the act of 1907 were prosecuted, regardless of the order which this court had made temporarily suspending the enforcement of the same; that these attacks on the part of the governor and State officials against the company and its agents and in the manner therein described, had had the effect of demoralizing the servants, agents and employees of the company to such an extent as to render it well nigh impossible for complainant to properly discharge the duties which it owed the public as a common carrier, and that owing to many other reasons stated therein the complainant was deterred from asserting the rights which were guaranteed it by the Constitution of the United States. For a more complete statement of facts reference is made to the petition which has been filed, and is a part of the record.

After considering the petition, the court made the following statement:

"The application now made to modify the injunctions heretofore granted in these causes present a condition of affairs unprecedented in the judicial annals of this country.

"After a full and complete hearing of the matters raised by the pleadings in these causes, injunctions, pending the hearing of the questions involved in the original suits, were granted. The Court, in granting such injunctions, followed the course approved by the Supreme Court of the United States in the cases of Smyth *v.* Ames, Reagan *v.* Farmers' Loan and Trust Company, Cotting *v.* Kansas Stock Yards Company, and Prout *v.* Starr, and followed by the Circuit Courts of the United States in numerous other cases.

"The effect of the order restraining the Corporation Commission of North Carolina, *et al.*, was to preserve the rights of the parties until the master to whom this cause had been referred could have an opportunity to report the facts and thereby enable the court to correctly determine whether the act in question is confiscatory, and, in order to protect the traveling public, the complainants were required to give ample bond and security to secure the payment into the registry of the court a sum sufficient to pay the difference between the present rate and the proposed rate to those who might in the meantime purchase tickets.

"It is unjust to say that the question of States' rights is involved in this controversy. It is equally unjust to insist that what the court has done in the premises was an interference on the part of the federal court with the State courts. However, on the other hand, there has been a manifest disposition on the part of the State officials to interfere with the federal court in its procedure to do equal justice between the complainants and the defendants, and in the exercise of those powers necessarily incident to the protection of its jurisdiction.

"If this kind of obstruction should prevail, and citizens are thus to be denied the rights guaranteed them by the Constitution of the United States, then those provisions of the Constitution would become a dead letter, as there would be no means of enforcing them.

"When the motion for an interlocutory injunction was

made in these causes there was full argument before me by counsel representing the complainant and by counsel representing the defendants, the members of the Corporation Commission, the Attorney General and the Assistant Attorney General of North Carolina. This argument lasted over several days and covered all points at issue. Upon this argument and my consideration of the case I entered the interlocutory injunctions. On a subsequent occasion the matter was again presented to me on the trial of a writ of *habeas corpus*. I then delivered a written opinion which states my views of the law. I feel no doubt as to the soundness of these views, nor as to the jurisdiction of this court, nor its rights and duty to enter the interlocutory decree, nor, in order to protect the jurisdiction of this court, to discharge on *habeas corpus* the persons who had been arrested by the State authorities for compliance with the orders of this court.

"The court still considers that it would be its duty to continue this protection whenever its action in the premises should be thus lawfully invoked. But, as the complainants, for the protection of whose rights the interlocutory decrees were entered, now move the court permission to surrender the protection of said order, to the extent indicated in their respective petitions, there is nothing for the court to do except to grant the permission prayed."

In view of the facts contained in the petition, the court at that time entered an order modifying the order theretofore granted in accordance with the request of the petitioner.

EXHIBIT C.

Provisions of North Carolina Statutes.	Provisions of Nebraska Statutes.
"The Corporation Commission shall have such general control and supervision of all railroad, street railway, steamboat, canal, express and sleeping car companies or corporations and of all other companies or corporations engaged in the carrying of freight or passengers, of all telegraph and telephone companies, of all public and private banks and all loan and trust companies or corporations, and of all building and loan associations or companies, necessary to carry into effect the provisions of this chapter, and the laws regulating such companies." (Revisal of 1905, sec. 1066.)	"That the board hereby created shall have authority to inquire into the management of the business of all common carriers, subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the board to perform the duties and carry out the objects for which it was created." * * * (Compiled Statutes of Nebraska, ch. 72, art. VIII, sec. 12.) "* * * said board (of transportation) shall have the general supervision of all railroads operated by steam in the State, and shall inquire into any neglect of duty or violation of any of the laws of this State by railroad corporations doing business in this State or by any officer, agent, or employee of any railroad cor-

poration doing business in this State." * * *

(Compiled Statutes of Nebraska, 1893, ch. 72, art. VIII, sec. 17.)

"The Commission, whenever in its judgment any corporation has violated any law, shall give notice thereof in writing to such corporation, and, if the violation or neglect is continued after such notice shall forthwith present the facts to the Attorney General, who shall take such proceedings thereon as he may deem expedient."

(Revisal of 1905, sec. 1113.)

No corresponding provision in Nebraska statutes.

"It shall be the duty of the Attorney General:

"1. To defend all actions in the Supreme Court in which the State shall be interested or is a party, and also when requested by the Governor or either branch of the General Assembly to appear for the State in any other court or tribunal in any cause or matter civil or criminal in which the State may be a party or interested."

(Revisal of 1905, sec. 5380, sub.-sec. 1.)

"The Attorney General shall appear for the State and prosecute and defend all actions and proceedings, civil or criminal, in the Supreme Court in which the State shall be interested or a party, and shall also when requested by the Governor or either branch of the legislature appear for the State and prosecute and defend in any other court or before any officer any cause or matter, civil or criminal in which the State may be a party or interested.

(Compiled Statutes of Nebraska, 1893, ch. 83, art. V, sec. 1a.)

"The Attorney General may on his own motion or whenever thereunto requested by any officer of the Executive Department having charge of any official bond, contract or matter shall upon a breach thereof prosecute any official bond deposited in any office of the Executive Department or any contract in which the State is interested and may and when so requested shall bring, prosecute and defend for the State any suit, matter or thing, civil or criminal, in which the State is interested or relating to any matter connected with the Executive Department."*

(Ch. 83, art. V, sec. 2.)

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* Sec. 1 of Art. 5, of the Constitution of Nebraska provides that "The Executive Department shall consist of a Governor, Lieutenant Governor, Secretary of State, Auditor of Public Accounts, Treasurer, Superintendent of Public Instruction, Attorney General, and Commissioner of Public Lands and Buildings."

"At the request of the * * * Corporation Commissioners * * * he (Attorney General) shall prosecute and defend all suits relating to matters connected with their departments."

(Revisal 1905, sec. 5380, sub.-sec. 2.)

No corresponding provision in the Nebraska statutes authorizing the Board of Transportation to require the services of the Attorney General.

(It shall be the duty of the Attorney General) "to consult with and advise the Solicitors, when requested by them in all matters pertaining to the duties of their office."

(Revisal 1905, sec. 5380, sub.-sec. 4.)

"The Attorney General shall consult with and advise the District Attorneys when requested by them in all matters pertaining to the duties of their office; * * *"

(Compiled Statutes of Nebraska, 1893, ch. 83, art. V, sec. 3.)

"* * * The North Carolina Corporation Commission shall publish the rates fixed by this act for the several railroads operating in this State on or before the first day of June, 1907."

(Sec. 2 of act of March 2, 1907, in respect to passenger rates.)

No corresponding provision in the Nebraska rate statute involved in Smyth *v.* Ames.

"That mileage books of one thousand miles in each book shall be kept on sale at such railroad ticket offices in North Carolina as shall be named and designated by the Corporation Commission of North Carolina and when such mileage book is purchased it shall be good in the hands of any person or persons named therein on all railroads on which the fare is the same as or less than the fare on the road of the company selling such mileage book; * * *"

(Sec. 3 of the act of March 2, 1907, in respect to passenger rates.)

No corresponding provision in the Nebraska rate statute involved in the case of Smyth *v.* Ames.

"That the Corporation Commission created by the laws of North Carolina shall not in fixing the maximum rates and charges * * * permit or allow any such common carrier to charge, * * * a greater * * * rate for the transportation of any article * * * where the initial point of shipment is on the road or line of one common carrier in this State and the terminal point of said shipment is on the line or road of another common carrier in this State, than is the sum of the present local rates now established, prescribed or approved by said Corporation Commission, less a reduction of 25 per centum. * * *"

(Sec. 1 of the act of March 9, 1907, in respect to freight rates.)

No corresponding provision in the Nebraska rate statute involved in the case of Smyth *v.* Ames.

"The Corporation Commission is hereby directed to prepare and publish the tariff of rates, charges and tolls to be charged and collected by railroad companies in this State as authorized by this act on or before July 1, 1907."

(Sec. 5 of the act of March 9, 1907, in respect to freight rates.)

No corresponding provision in the Nebraska rate statute involved in the case of Smyth *v.* Ames.